CLERK'S COPY.

TRANSCRIPT OF RECORD

Pet. 166 85-796 Nos. 2 & 2C

Supreme Court of the United States

OCTOBER TERM, 1937

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 9, 1937.

CERTIORARI GRANTED DECEMBER 13, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement pursuant to Rule XIII	1	1
Record from D. C. U. S., Southern New York	3	2
Summons	3	2
Complaint	4	3
Notice of motion to dismiss complaint by defendant	9	4
Order directing the depositions of Bakhmeteff and Ughet to be taken	12	6
Certificate of referee	14	7
Oath of referee	16	8
Depositions, affidavits and exhibits in support of motion to dismiss:		
Deposition of Serge Ughet	17	9
Boris Bakhmeteff	60	43
Affidavit of Dimitry G. Ter-Assatouroff	108	69
Nicholas Karinsky	115	74
Harold Stanley	120	77
Charles Sargent	123	78
Stuart H. Patterson	125	79

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 11, 1938.

	Original	Print
Record from D. C. U. S., Southern New York—Continued.		
Depositions, affidavits and exhibits in support of motion to dismiss—Continued.		
Affidavit of William C. Cannon	132	84
Samuel W. Reyburn	136	86
George B. Link	140	88
George J. Kenny	143	90
Rodney Dean	145	91
Arthur B. Hatcher	147	92
C. A. McKeon	149	93
Arthur J. Carey	151	94
Grayson M-P. Murphy	153	95
Eugene W. Stetson	155	96
Conrad de Sahmen	157	97
Defendant's Exhibits:		
1—Letter from Ughet to Fulton dated July 1, 1919	163	100
2—Letter from Fulton to Ughet dated July 11, 1919	167	103
3—Letter from Sabin to Fulton dated July 10, 1919	169	104
3a—Same (photostat)	170	105
4—Letter from Sabin to Polk dated June 9, 1919	170	105
5—Letter from Bakhmeteff to National City Bank dated November 28, 1917	173	107
6—Letter from Sabin to Ughet dated December 12, 1917	175	108
7—Letter from Sabin to Secretary Hughes dated December 9, 1921	177	109
8—Letter from Ughet to Guaranty dated July 12, 1917	179	110
9—Letter from Guaranty to Ughet dated July 13, 1917	180	111
10—Letter from Coudert Brothers to Mr. C. H. Russell, dated June 17, 1919	181	111
11—Letter from Coudert Brothers to Mr. Russell dated June 18, 1919	182	112
12—Memorandum for Mr. Russell dated June 26, 1919	183	113
13—Letter from Mr. Russell to Coudert Brothers dated July 1, 1919	184	113
14—Letter from Fulton to Guaranty dated July 3, 1919	185	113
15—Letter from Guaranty to Mr. Russell dated July 11, 1919	186	114
16—Letter from Ughet to group of bankers dated June 16, 1919	187	114
16a—The same dated July 8, 1919	188	115
17—Cablegram from Credit Chancellery to Guaranty dated January 28, 1917	189	116

	Original	Print
Record from D. C. U. S., Southern New York—Continued.		
Depositions, affidavits and exhibits in support of motion to dismiss—Continued.		
Defendant's Exhibits—Continued:		
18—Minutes of meeting of Protective Committee dated July 2, 1919	190	116
19—Minutes of meeting of Protective Committee dated July 8, 1919	196	122
20—Same dated July 11, 1919	200	123
21—Letter from Secretary Hughes to Guaranty dated December 2, 1921	206	127
22—Letter from Guaranty to Secretary Hughes dated December 9, 1921	207	127
23—Letter from Secretary Hughes to Guaranty dated January 17, 1922	209	129
Order for taking of deposition of Mahlon B. Doing	211	130
Answering affidavits and exhibits in opposition to motion to dismiss:		
Affidavit of Mahlon B. Doing	213	131
Exhibits 1 to 18, inc.—Correspondence	218	133
Affidavit of Dimitry G. Ter-Assatouroff	246	151
Boris Brasol	264	163
Serge Ughet	281	174
Second affidavit of Serge Ughet	286	177
Exhibits—Correspondence	288	178
Affidavit of Henry Munroe	295	182
Letter, Polk to Poole, December 7, 1921	297	184
Plaintiff's Exhibits:		
1—Letter dated April 7, 1917 from Bakhmeteff to Secretary of State, re appointment of Ughet, and reply thereto	299	185
2—Certificate of State Department dated January 2, 1919 re appointment of Bakhmeteff as Russian Ambassador on July 5, 1917	300	186
3—Soviet decree published November 28, 1917, dismissing Bakhmeteff, with translation.	301	186
4—Cablegram from American Ambassador, Russia to State Department, Dec. 4, 1917, re dismissal Bakhmeteff	304	188
5—Cable from American Ambassador, Russia to State Department, June 7, 1918, re appointment Litvinov as Russian Ambassador	306	189
6—Letter from L. Martens to State Department, dated March 18, 1919, stating he was Russian representative with certificate of appointment by Soviet Government attached	307	190

	Original	Print
Record from D. C. U. S., Southern New York—Continued.		
Answering affidavits and exhibits in opposition to motion to dismiss—Continued.		
Plaintiff's Exhibits—Continued:		
7—Letter from Bakhmeteff to State Department dated June 7, 1922, appointing Ughet custodian of property in United States...	310	191
8—Letter from Ughet to State Department dated October 21, 1933, resigning as Russion Financial Attache and reply thereto.	314	193
9—(a) Letter from Polk to Sabin dated January 29, 1918; (b) Letter from Sabin to Polk dated January 31, 1918; (c) Letter from Sabin to Ughet dated December 12, 1917; (d) Letter from Polk to Sabin dated February 4, 1918.....	316	195
10—Letter from Bakhmeteff to Polk dated April 9, 1918, with enclosure	321	197
11—(a) Letter from Leffingwell to Polk dated May 9, 1919; (b) Letter from Federal Reserve Board Treasury dated May 7, 1918; (c) Letter from Polk to Leffingwell dated June 5, 1918.....	325	200
12—(a) Letter from Polk to Sabin dated June 4, 1919; (b) Letter from Sabin to Polk dated June 9, 1919.....	328	201
13—Recital as to.....	330	202
14—Despatch from American Embassy, Moscow, to State Department, No. 1146, certified January 20, 1936 with 7 papers appended thereto:		
1—Letter from Carson to Commissariat of Finance dated September 2, 1931	336	206
2—Memorandum contained in letter from Wardwell to Rosenshein dated October 14, 1933.....	337	207
3—Letter from Huber to Rosenshein dated July 13, 1934.....	339	208
4—Memorandum attached to letter of Carson dated August 19, 1934....	341	209
5—Memorandum attached to letter of Carson dated September 5, 1934..	342	210
6—Letter from Wardwell to Rosenshein dated October 26, 1934.....	343	211
7—Cable from Wardwell to Commissariat of Finance dated June 28, 1934	345	212
15—Letter—Acting Secretary of Treasury to Attorney General dated August 27, 1935..	346	212
16—Letter—Cordell Hull to Attorney General dated November 21, 1935, and list of enclosures	351	216

	Original	Print
Record from D. C. U. S., Southern New York—Continued.		
Replying affidavits and exhibits in further support of motion to dismiss:		
Affidavit of Albert Breton	363	223
J. Paul Huber	367	226
Dimitry G. Ter-Assatouroff	374	230
Grayson M.-P. Murphy	382	235
John Watts	384	236
Ralph M. Carson	386	237
Defendant's Exhibits:		
24—Order in Lehigh case dated December 21, 1927	398	245
25—Certificate of Acting Secretary of State dated December 20, 1927	400	246
26—Letter from Secretary Hughes to L. M. Garrison dated February 19, 1923	401	247
27—Letter from National City Bank to Guaranty dated July 18, 1916	402	248
28—Letter from National City Bank to Guaranty dated July 19, 1916	403	248
29—Letter from Credit Chancellery, Petrograd, dated September, 1915	404	249
30—Translation of 29	406	250
31—Letter from Credit Chancellery to Guaranty dated 6/19, July, 1916	408	251
32—Translation of 31	409	252
33—Letter from Guaranty to Credit Chancellery dated September 8, 1916	410	253
34—Memorandum signed G. M. P. M. dated March 19, 1917	411	253
Assignment made by Ughet to U. S. of A., dated August 25, 1923	412	254
Opinion, Caffey, J., granting motion to dismiss	416	257
Order dismissing complaint on merits	442	274
Judgment	445	276
Petition for appeal and order allowing appeal	447	277
Assignment of errors	449	278
Citation (omitted in printing)	452	
Stipulation as to record	453	280
Clerk's certificate (omitted in printing)	454	
Opinion, Swan, J.	455	281
Concurring opinion, Manton, J.	458	285
Judgment	462	292
Clerk's certificate	464	466
Order allowing certiorari	465	467

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,

against

GUARANTY TRUST COMPANY OF NEW YORK, Defendant-Appellee

STATEMENT PURSUANT TO RULE XIII

This action at law, for the recovery of the sum of $4,976,722.78 with interest from certain dates alleged to remain on deposit with the defendant Trust Company to the account of the State of Russia, and assigned by the Soviet Government to the United States of America in November, 1933, was instituted on September 21, 1934 by the due service of a summons and complaint upon the defendant-appellee.

After a contested motion an opinion dated March 28, 1935 was handed down by Judge Caffey granting defendant's motion to take the depositions of Boris Bakhmeteff and Serge Ughet, and an order based thereon dated April 30, 1935 was signed allowing depositions of Boris Bakhmeteff and Serge Ughet to be taken by the defendant, and such depositions were taken. Thereafter, an opinion of Judge Caffey dated June 13, 1935 sustaining the referee's ruling denying the claim of privilege of Bakhmeteff was handed down. The de-
[fol. 2] fendant-appellee on October 21, 1935 served on the plaintiff-appellant a notice of motion supported by the aforementioned depositions, and affidavits and exhibits, for a judgment dismissing the complaint, on the ground that the cause of action alleged therein did not accrue within the time limited by law for the commencement of an action thereon.

After several adjournments, on October 5, 1936 the motion to dismiss was brought on for hearing before the Honorable Francis G. Caffey. Judge Caffey on October 13, 1936 handed down his opinion on said motion, and on November 2, 1936, signed an order based thereon granting said motion and dismissing the complaint. Also under date of November 2, 1936, Judge Caffey signed an order denying the motion of the United States to strike out the depositions of Bakhmeteff

and Ughet. On November 6, 1936 judgment was entered dismissing the complaint on the merits.

On February 3, 1937 an appeal was allowed by the order of Honorable Robert P. Patterson, and a citation issued on the same date returnable March 5, 1937. On February 4, 1937, said order and petition for appeal, and assignment of errors were filed in the office of the Clerk of the said District Court.

On the same date said citation was duly served and filed with the Clerk of the said District Court.

There has been no change of parties since the commencement of this action.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 21st day of September, A. D. 1934.

Charles Weiser, Clerk. (Seal.)

Martin Conboy, Plaintiff's Attorney, U. S. Attorney, Office and Post Office Address: U. S. Attorney, U. S. Courthouse and P. O. Building, Borough of Manhattan, New York City.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

Plaintiff, by its attorney, Martin Conboy, United States Attorney for the Southern District of New York, complaining of the defendant above named, respectfully shows to this Court and alleges, on information and belief:

I. That at all times hereinafter mentioned plaintiff was and still is a corporation sovereign.

II. That at all times hereinafter mentioned defendant was and still is a corporation organized and existing under the Banking Laws of the State of New York, engaged in the business of banking, and having its principal office and place of business in the Borough of Manhattan, City, State and Southern District of New York.

III. That at all times hereinafter mentioned the Government of the State of Russia was and still is a corporation sovereign.

[fol. 5] IV. That on or about July 15, 1916, the Government of the State of Russia opened a deposit account with the defendant in New York.

V. That from December 12, 1917, to and including August 23, 1934, and from said latter date to the present, there remained in said deposit account owing by said defendant, the sum of Four Million, Nine Hundred Seventy-Six Thousand, Seven Hundred and Twenty-Two Dollars and Seventy-eight Cents ($4,976,722.78), together with accrued bank interest from December 12, 1917.

VI. That on November 16, 1933, the Government of the State of Russia assigned to the plaintiff all of its right, title and interest in and to the amount on deposit with the defendant in the aforesaid sum of Four Million, Nine Hundred Seventy Six Thousand, Seven Hundred Twenty-two Dollars and Seventy-eight Cents ($4,976,722.78), and accrued bank interest, being the amount referred to in the preceding paragraph of this complaint, and since November 16, 1933, the plaintiff has been and now is the owner of all right, title and interest in and to the aforesaid deposit account.

VII. That on or about August 23, 1934, the plaintiff duly demanded payment to it of the sum of Four Million, Nine Hundred Seventy-six Thousand, Seven Hundred and Twenty-two Dollars and Seventy-eight cents ($4,976,722.78), being the amount remaining on deposit with the defendant as alleged in the fifth paragraph of this complaint, together with accrued bank interest but the defendant failed, neg-
[fol. 6] lected and refused, and still fails, neglects and refuses to pay to the plaintiff the said amount or any part thereof.

Wherefore, plaintiff demands judgment against the defendant for Four Million, Nine Hundred Seventy-six Thousand, Seven Hundred Twenty-two Dollars, Seventy-eight Cents ($4,976,722.78), with accrued bank interest on said sum from December 12, 1917 to August 23, 1934 and with interest on these sums at the rate of Six (6%) per centum per annum from August 23, 1934, together with the costs and disbursements of this action.

Martin Conboy, United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office & P. O. Address, U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

[fols. 7-8] *Duly sworn to by Leon E. Spencer. Jurat omitted in printing.*

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIR:

Please Take Notice that upon the summons and complaint, upon the order herein of Hon. Francis G. Caffey, United States District Judge, made April 30, 1935, upon the annexed depositions of

1. Boris Bakhmeteff, verified September 19, 1935, and

2. Serge Ughet, verified September 19, 1935;

upon the annexed affidavits of

3. Dimitry G. Ter-Assatouroff, verified October 7, 1935

4. Nicholas S. Karinsky, verified October 7, 1935

5. Harold Stanley, verified October 18, 1935

[fol. 10] 6. Charles Sargent, verified October 18, 1935

7. Stuart H. Patterson, verified October 17, 1935

8. William C. Cannon, verified October 17, 1935

9. Samuel W. Reyburn, verified September 25, 1935

10. George B. Link, verified October 18, 1935

11. George J. Kenny, verified October 10, 1935

12. Rodney Dean, verified October 15, 1935

13. Arthur B. Hatcher, verified September 25, 1935

14. C. A. McKeon, verified October 16, 1935, and

15. Arthur J. Carey, verified October 9, 1935;

and upon the affidavits heretofore filed herein of

16. Grayson M.-P. Murphy, verified February 25, 1935, and

17. Eugene W. Stetson, verified February 25, 1935,

together with Defendant's Exhibits for Identification 1, 2, 3, 5, and 6, and Exhibits 3A, 8, 9, 10, 11, 12, 13, 14, 15, 16, 16A, 17, 18, 19, 20, 21, 22 and 23 described in and attached to [fol. 11] said depositions and affidavits respectively, the undersigned will pursuant to the Conformity Act 28 USC § 724, New York Civil Practice Act § 307, and Rules 107 and 120 of the Rules of Civil Practice of the State of New York, and other provisions of law, move at a term of this court for the hearing of motions to be held at the Old Post Office and Federal Building, Borough of Manhattan, New York, N. Y., on November 8, 1935, at 10:30 a. m. or as soon thereafter as counsel can be heard for judgment dismissing the complaint on the ground that the cause of action alleged therein did not accrue within the time limited by law for the commencement of an action thereon, and for such other and further relief as may be just.

Please Further Take Notice that pursuant to Rule 64 of the Rules of Civil Practice of the State of New York, the undersigned require that any answering affidavits to be used

upon the above-noticed motion be served at least five days before the return day.

Dated, New York, N. Y., October 21, 1935.

Yours, etc., Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant, Office and Post Office Address: 15 Broad Street, Borough of Manhattan, New York, N. Y.

To: Hon. F. W. H. Adams, United States Attorney, Old Post Office & Federal Building, Borough of Manhattan, New York, N. Y.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DIRECTING TESTIMONY OF UGHET AND BAKHMETEFF TO BE TAKEN—April 30, 1935

The above-named defendant having duly moved for an order directing that the testimony of Boris Bakhmeteff and Serge Ughet be taken herein by deposition on behalf of the defendant for use upon a motion subsequently to be made by the defendant to dismiss the complaint on the ground that the cause of action alleged therein did not accrue within the time limited by law for the commencement of an action thereon, and said motion having duly come on to be heard,

Now, on reading and filing the affidavits of J. Paul Huber verified December 14, 1934, of Ralph M. Carson verified February 1, 1935, of Grayson M-P. Murphy verified February 25, 1935, of Eugene W. Stetson verified February 25, [fol. 13] 1935, of Frank L. Polk verified March 25, 1935, and of Ralph M. Carson verified March 26, 1935, all in support of the motion, and after hearing John W. Davis, Esq., attorney for the defendant, in support of said motion, and Martin Conboy, Esq., the United States Attorney, in opposition thereto, and due deliberation having been had,

It is, upon motion of Davis Polk Wardwell Gardiner & Reed, attorneys for the defendant, and on filing the opinion of the Court,

Ordered that Harold Harper, Esquire, be and he hereby is appointed a referee to take the depositions of the said Boris Bakhmeteff and the said Serge Ughet in the manner prescribed by Rule 120 of the Rules of Civil Practice of the State of New York, with respect to all matters or facts

within the knowledge of the said persons showing or tending to show that a cause of action covering the matters alleged in the complaint accrued in favor of the State of Russia more than six years before the commencement of this action, provided that neither of said depositions nor any part thereof shall be admissible upon the trial of this action; and it is

Further Ordered that the said referee be and he hereby is authorized and directed to proceed with the taking of said depositions forthwith, at such place or places within the Borough of Manhattan, New York, N. Y., as the said referee shall fix and at such times convenient to the said referee as shall be designated by notice to be served by defendant's attorneys upon the United States Attorney not less than two days in advance, subject to such adjournments as the referee may direct

Francis G. Caffey, U. S. D. J. C. W.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF REFEREE

I, Harold Harper, the Referee named in the order of this Court dated April 30, 1935, made by Honorable Francis G. Caffey, United States District Judge, for the taking of the depositions of Boris Bakhmeteff and Serge Ughet in the manner prescribed by Rule 120 of the Rules of Civil Practice of the State of New York with respect to all matters or facts within the knowledge of the said persons showing or tending to show that a cause of action covering the matters alleged in the complaint in the above-entitled action accrued in favor of the State of Russia more than six years before the commencement of said action,

Certify that the depositions of Boris Bakhmeteff and Serge Ughet were duly taken before me at my office No. 70 Pine Street, New York, N. Y., on May 9, May 10, August 8 and September 17, 1935; that prior to the taking of said depositions I took and subscribed the oath of office in the manner prescribed by New York Civil Practice Act § 126; [fol. 15] that the minutes attached to this certificate are a true and correct record of the appearances and proceedings

had before me and of the testimony of the witnesses; that the ink corrections in said minutes marked with my initials are corrections made by the witnesses in their testimony before they subscribed and swore to the same; and that on the seven defendants' exhibits marked for identification on the said depositions and described in the said minutes, I have placed my initials together with the date on which this certificate is made.

Dated, New York, N. Y., October 7, 1935.

Harold Harper.

STATE OF NEW YORK,
County of New York, ss:

On the 7th day of October, 1935, before me personally appeared Harold Harper, to me known and known to me to be the individual described in and who executed the foregoing certificate, and acknowledged to me that he executed the same.

Helen Werner, Notary Public, Bronx County No. 60. Register's No. 61W37. Certificate filed in New York County. Clerk's No. 391, Register's No. 7W235. Commission Expires March 30, 1937.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

OATH OF REFEREE

I, Harold Harper, the referee appointed by an order of this Court, made and entered in the above-entitled action and bearing date April 30, 1935, to take the depositions of Boris Bakhmeteff and Serge Ughet with respect to certain matters described in said order, do solemnly swear that I will faithfully, honestly and impartially discharge the trust committed to me by said order.

Harold Harper.

Sworn to before me this 8th day of May, 1935. Helen Werner, Notary Public, Bronx County No. 60. Register's No. 61W37. Certificate filed in New York County. Clerk's No. 391, Register's No. 7W235. Commission Expires March 30, 1937.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION OF SERGE UGHET

No. 70 Pine Street, New York City,
May 9, 1935, 10:30 A. M.

Before Harold Harper, Esq., Referee

Appearances:

Hon. Martin Conboy, United States Attorney, Leon E. Spencer, Esq., Assistant United States Attorney; Henry Munroe, Esq., United States Treasury Department, Washington, D. C., for the Plaintiff.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Ralph M. Carson, Esq., of counsel, Attorneys for Defendant.

[fol. 18] The Referee states that he has taken and subscribed the oath of office, as required by Section 126 of the Civil Practice Act.

It is Stipulated that the fees of the Referee for time occupied in the hearing of this reference be fixed at $35 an hour, to be paid by the defendant, Guaranty Trust Company of New York.

(Serge Ughet appeared to testify, pursuant to subpœna.)

(Adjourned at 10:45 A. M., at the request of the United States Attorney, until 2:30 P. M.)

Afternoon Session

May 9, 1935, 2:30 P. M.

Before Harold Harper, Esq., Referee

Appearances:

Hon. Martin Conboy, Leon E. Spencer, Esq., Henry Munroe, Esq., Ralph M. Carson, Esq.

Mr. Carson: Shall we call this the deposition of Mr. Serge Ughet, taken pursuant to order of Hon. Francis G. Caffey,

[fol. 19] United States District Judge, dated April 30, 1935?

Mr. Conboy: I think there is a preliminary matter that I call to the attention of the Court and counsel at this time. It has just recently been brought to my attention that Mr. Ughet was employed in a capacity that made him a part of the diplomatic representation of the Russian Government in this country at the time that the matters about which he is to be interrogated took place, and, if that be so, it is my understanding of principles of International Law that there can be no examination of him with respect to matters that came to his attention while he was acting in the capacity of one connected with the representation of a foreign government.

This is something that, it seems to me, the United States is interested in, because I represent a sovereign government, too, and I think that we would object to any attempt on the part of anyone to examine one of our representatives with regard to matters that came within his knowledge or to his attention during the time while he was employed in that capacity. It seems to me, therefore, that an examination of either Mr. Ughet or Mr. Bakhmeteff, the other proposed witness, is improper for that reason.

Mr. Carson: May I point out two things, Mr. Referee, preliminarily? First, that this objection is one which should have been raised in opposition to, and I think was determined by the determination of the motion itself, in that Mr. Ughet's status was fully disclosed in the moving papers. Second, it would seem to me, if there were an objection of [fol. 20] this character, it could not be raised by the United States, not being the sovereign at interest.

Mr. Conboy: With respect to the first objection, it does not seem to me that it was our duty to raise it at the time the application was made for the examination of witnesses, because the sole question for the Court to determine at that time was whether the provisions of the Civil Practice Act with regard to the taking of depositions in support of a proposed motion was comprised within the conformatory rule, not as to the quality. It was not the proper time to raise objection as to the quality of the witness himself. That is more properly raised at the time that the testimony of the witness is proposed to be taken, not at the time of the application made for the examination of a witness

under the provisions of the Civil Practice Act of this State.

With respect to the second objection, the United States is an assignee, and it is my understanding that an assignee, under a case that was decided by the Court of Appeals of this State in 69 N. Y., is a proper party to raise the objection.

The Referee: The general rule that you invoke is novel, so far as the Referee is concerned. I will take the evidence subject to a motion to strike. I shall be glad to have authorities on it later, but I think I will not hold up the proceedings. The objection will be overruled.

Mr. Conboy: Exception.

The Referee: An exception to the United States.

[fol. 21] SERGE UGHET, called as a witness on behalf of the defendant, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Carson:

Q. Mr. Ughet, you were in 1917 Financial Attache to the Russian Embassy in the United States, were you?

A. Yes, beginning from April, 1917, I believe.

Q. How long did you continue as such Financial Attache?

A. Up to November 16, 1933.

Q. Under whom, as Russian Ambassador, did you serve as Financial Attache?

A. First, under Mr. George Bakhmeteff, and later on under his successor, Mr. Boris Bakhmeteff.

Q. Do you recall approximately when Mr. Boris Bakhmeteff resigned as Russian Ambassador to the United States?

A. On June 30, 1922.

Q. Thereafter, were you the sole representative of the State of Russia or Government of Russia in this country?

A. Yes, sir.

Q. Until the date you named?

A. Yes, sir.

Q. Are you the same Serge Ughet as is mentioned in the action in the United States Court, entitled "State of Russia vs. National City Bank and Bankers Trust Company"?

A. Yes.

Q. Are you the same Serge Ughet as is mentioned in the action in the United States Court entitled "State of Russia vs. Lehigh Valley Railroad Company"?

A. Yes.

Q. About when was this latter action commenced?

A. I recall soon after the November revolution in 1917. Probably it was in 1918 when it started. At any rate, some legal moves were made at the time.

[fol. 22] Q. What were your duties generally as Financial Attache to the Russian Embassy here?

A. To supervise all financial matters of interest to the Russian Government.

Q. In that capacity, were you familiar with a certain account kept with the Guaranty Trust Company of New York, the defendant here, in New York, under the name of the Russian Government or a department of the Russian Government?

A. You mean with the Guaranty Trust Company?

Q. Yes, with the Guaranty Trust Company.

A. Yes, there was.

Q. Do you remember the exact title of that account?

A. I believe it was in French, and the term was "Ministere des Finances, Section Etrangere".

Mr. Conboy: That is the spelling of the account itself?

Mr. Carson: Yes, sir.

Q. Do you recall approximately what was the balance in that account at the end of 1917?

A. Almost $5,000,000—$4,900,000; something like that.

Q. After the revolution in Russia of November, 1917, I understand that you continued to perform your functions that you have described; is that correct?

A. Yes.

Q. Did you continue to draw on and dispose of the funds of the Russian Government in this country for its requirements in the United States?

A. Yes.

Q. In that connection, did you make payments by way of service on a $50,000,000 credit which the Russian Government had made in the United States?

A. $50,000,000 credit, yes.

[fol. 23] Q. Did you draw on Russian Government funds here for the payment of obligations to the United States Government?

A. Yes.

Q. Were you, in 1918, acquainted with Mr. Frank L. Polk?

A. Yes.

Q. What was his position?

A. Counselor of the State Department.

Q. Were you acquainted with Mr. Charles H. Sabin?

A. Yes.

Q. And you knew him as President of the Guaranty Trust Company, did you?

A. Yes.

Q. Now, did you have a conference with Mr. Polk and Mr. Sabin with respect to this Ministere des Finances, Section Etrangere account which you have described, during the year 1918 at any time, either in Washington or in New York? A. It was in Washington, and it was either in December, 1917, or in January, 1918.

Q. Who were present besides yourself?

A. Mr. Frank L. Polk and Mr. Charles H. Sabin.

Q. Now, was anything said at that conference with reference to the drawing on the Ministry of Finance account by the Russian Ambassador or by yourself?

Mr. Conboy: That I object to upon the ground that whatever knowledge the witness has in this connection was acquired by him in the capacity of diplomatic representative of a foreign government, and is therefore privileged. The witness is not permitted to testify to the same without the waiver of his government.

The Referee: The objection, as far as it rests upon the [fol. 24] ground of privilege, is overruled. Is that the only objection you now urge?

Mr. Conboy: I do not recall what other defects there are. Will you read the question, please?

(Last question repeated.)

Mr. Carson: I will ask for a "yes" or "no" answer to that question, and I will later ask for details.

The Referee: It is now limited to a "yes" or "no" answer, Mr. Conboy.

Mr. Conboy: Exception to the ruling of the Referee.

By Mr. Carson:

Q. You may answer "yes" or "no" to that question. Do you understand the question?

A. Yes, I do, but, your Honor, may I ask you for a ruling, because that is a question to which I couldn't answer "yes" or "no", because of the form in which it is put to me, was not discussed at the time at this conference.

Mr. Carson: I will take that as an answer.

The Referee: Take that as an answer and proceed with the examination.

Q. Mr. Ughet, will you repeat anything said at that conference by Mr. Sabin or by yourself or by Mr. Polk with reference to the payment of the Ministry of Finance account by Guaranty Trust Company to or upon the orders of the Russian Government?

(Discussion off the record.)

By Mr. Carson:

Q. Do you remember the question?

A. Yes.

[fol. 25] Q. Answer it, please.

A. At this conference Mr. Polk asked Mr. Sabin whether the Guaranty Trust Company would consent to release this fund to the jurisdiction of the Russian Embassy, and Mr. Sabin pointed out that because the Guaranty Trust Company was having certain claims against Russia in consequence of November events of 1917, that the Guaranty Trust Company, therefore, was not feeling at liberty to release this fund to the jurisdiction of the Russian Embassy.

Q. You heard that statement?

A. It was in my presence, yes.

Q. Was anything else said by you, Mr. Polk or by Mr. Sabin on the subject, so far as you remember?

A. I must confess, no. That is to say, that is the general gist of the conference which I memorized. I couldn't say just exactly the words which were said at the time.

Q. Other things were said, but you cannot remember them, and you now stated the substance?

A. I remember the conference was a rather short one.

Q. Do you recall that the $50,000,000 credit of the Russian Government in this country, extended by certain American banks, matured in June, 1919?

A. Yes.

Q. What steps, if any, did you take on behalf of the Russian Government to meet that credit at maturity, in a general way?

A. To meet this credit at maturity—in fact, no steps were taken because at the time, to meet a payment of $50,000,000 was beyond, so to say, any human means.

Q. Do you recall when the last installment of interest fell due on that credit?

A. What do you mean by "last installment?"

[fol. 26] Q. The last increment of interest which would be payable on that credit, pursuant to the contract, assuming that the principal was paid at maturity.

A. You see, I remember that the interest was due on the 10th of January and 10th of July of every year, but what was the last installment, the 10th of January, 1919, or the 10th of July, 1919, that I don't remember. I believe it was the 10th of July, 1919, that the last payment was coming due.

Q. But you do recall there was an installment of interest on July 10, 1919?

A. Yes.

Q. Did you take any steps on behalf of the Russian Government to meet that liability?

A. Yes.

Q. Without stating what was said, will you please state whether you discussed the subject with the State Department in Washington before July, 1919?

A. I remember having discussed this matter with the United States Government, but whether it was with the Treasury Department or State Department, that I couldn't tell you. At any rate, I believe it was rather with the Treasury Department, though, perhaps, it was with the State Department, too, because at this specific time I was acting in a double capacity, because I was Financial Attache and I was Charge d'Affaires, so it may so happen that technically, as Charge d'Affaires, I was taking it up with the State Department, and as Financial Attache, with the Treasury Department.

Q. Mr. Bakhmeteff was abroad at that time, was he?

A. Yes.

Q. I find in the report in the Lehigh Valley case, a copy of a certificate from Mr. Polk, which I trust Mr. Conboy will let me read, and which states that since December 3, [fol. 27] 1918, you were Charge d'Affaires in this country; is that correct?

A. Yes, up to August 1, 1919, I believe.

Q. Now, I show you copy of a letter purporting to have been written by Mr. Polk to Charles H. Sabin at the Guaranty Trust Company, dated June 4, 1919, and ask you to examine that and state whether that refreshes your memory with respect to any conference with the State Department affecting the last installment of interest on the loan in question.

A. Yes, I do. That is exactly to what I was referring that I did not remember, whether it was with the State Department or Treasury Department that negotiations were taking place.

Q. Will you tell me whether or not the first paragraph of that letter refreshes your memory, and whether you can say that that constitutes the substance of a conversation which you had with Mr. Polk on that subject?

Mr. Conboy: I object to the witness characterizing it.
The Referee: Sustained.

Q. Refreshing your memory from the paper I have shown you, will you state what was the substance of the conversation that you had with Mr. Polk on that subject, and about when it took place?

Mr. Conboy: I object to that.
The Referee: Sustained. I take it your point is that counsel has not exhausted the witness's recollection.
Mr. Conboy: That is one point.
[fol. 28] The Referee: I will sustain it on that ground.

Q. Mr. Ughet, independently of that paper, do you have any recollection as to any conversation with Mr. Polk or anyone in the State Department in or about the month of May or June, 1919, with respect to the use of the account with the Guaranty Trust Company here involved to make payments on this $50,000,000 credit?

A. Yes. I would only state broadly there were discussions in Washington, because I couldn't say definitely whether they were with the Treasury Department or State Department, but at any rate they were with one of these two Government departments.

Q. State what was said by you and what was said by the Government department, to the best of your recollection.

Mr. Conboy: I certainly object to that.

The Referee: Sustained.

Mr. Carson: On what ground, Mr. Conboy?

Mr. Conboy: The objection was sustained.

The Referee: I think it is fairly apparent that conversation with one man or another is never competent.

Q. You cannot recall precisely with whom you had any conversation on that subject?

A. No.

Q. Will you state whether this paper I hand you, directing your attention to the first paragraph, refreshes your memory as to the person with whom you had the conversation?

A. I must admit not.

[fol. 29] Q. It does not refresh your memory at all?

A. No.

Q. Do you recall any conversation you had with any person in the State Department with respect to the use of the account with the Guaranty Trust Company?

Mr. Conboy: Same objection.

Q. (Cont'd.) For payment of this $50,000,000 credit in or about May or June, 1919, irrespective of whether you know his name?

The Referee: Please read the question.

(Last question repeated.)

The Referee: The answer will be limited to "yes" or "no." Overruled.

Mr. Conboy: Exception.

A. Your Honor, may I again give a qualified answer that it was with the State or Treasury Department. That I couldn't say in an affirmative way. Specifically that it was with the State Department, I couldn't say.

The Referee: That would not be an answer to this particular question. I take it your answer to this question is "no," that you cannot recollect?

The Witness: Then it is "no."

Q. Will you state in a general way what you did on behalf of the Government of Russia with respect to making

or meeting the interest liability on this $50,000,000 credit [fol. 30] which, as you have stated, fell due July 10, 1919?

A. I remember having brought this matter to the attention of the United States Government, either to the State——

Mr. Conboy: Excuse me a second, please. Let me have that question read.

(Last question repeated.)

Mr. Conboy: I can see that that does not fall within the issues of this case or the proposed defense in support of which this deposition is intended to be taken. I cannot conceive that it is.

The Referee: Supposing we let Mr. Carson explain its competency.

Mr. Carson: Mr. Referee, this testimony will show that the witness did certain acts on behalf of the State of Russia with respect to getting funds to pay this interest installment, that in so doing he approached the Guaranty Trust Company and requested the use of those funds, and was given a certain answer which will be offered in evidence. I am introducing the subject——

The Referee: Why not go specifically to this transaction with the Guaranty? Isn't that all that is material?

Mr. Carson: That is all I am asking about.

The Referee: The question of raising funds from some other source, for example.

Mr. Carson: If your Honor will listen to the question—will you read the question, Mr. Reporter?

[fol. 31] (Last question repeated.)

Mr. Carson: I apologize. May I add to the question "in so far as the account with Guaranty Trust Company was concerned"?

By Mr. Carson:

Q. Do you understand the question now?

The Referee: Is there objection to this question?

Mr. Conboy: Oh, yes.

The Referee: I sustain the objection as to the form of the question. You will have to ask, step by step, I think, what you want, Mr. Carson.

Q. After your conference in Washington which you have testified about generally, with respect to meeting payments on this $50,000,000 credit, did you have any conferences in New York with anybody on that subject?

Mr. Conboy: That I object to.

The Referee: Sustained.

Q. I show you a document dated June 13, 1919, purporting to be a letter written by yourself to the National City Bank, and ask you if you signed and delivered the original to the National City Bank?

Mr. Conboy: Is that a copy or an original?

Mr. Carson: A copy. I said "purporting to be a copy."

[fol. 32] Mr. Conboy: I object to it upon the ground it is immaterial and irrelevant whether he sent any letter to the National City Bank, or did not send it to the National City Bank.

The Referee: I think that is premature. I will overrule the objection to this question.

A. Your Honor, may I ask for a ruling?

The Referee: Surely.

The Witness: You see, to my memory, this letter was addressed by me to the National City Bank, and, at the request of the National City Bank, it was withdrawn by me.

Mr. Carson: That, I take it, will be an answer.

The Referee: That is an answer to your question, but he wishes to predicate some question on that to me.

The Witness: Yes, because, at the request of the National City Bank, subsequently perhaps, even dated the same date, I wrote a letter more or less on those same lines to the Protective Committee which was formed at the time for those 6½ per cent participation certificates.

The Referee: I think we had better limit ourselves. I do not know yet what use counsel intends to make of the letter. We will have to wait and see.

Mr. Carson: On that statement I cannot offer it in evidence.

The Referee: It is not in the record, yet, and it may never be.

[fol. 33] By Mr. Carson:

Q. I understand, Mr. Ughet, you did write a letter to the National City Bank with respect to this $50,000,000

credit on June 13, 1919, and you subsequently withdrew the letter; is that correct?

A. The bank asked me to withdraw it.

Q. You had a conference with the National City Bank on the subject?

A. Yes, or a telephone call.

Q. You subsequently wrote a letter on the same subject addressed to whom?

A. I think it was to Mr. Fulton, who was the chairman of the protective Committee of Bondholders, or certificate holders, of the 6½ per cent loan.

The Referee: Imperial Russian Government Bonds?

The Witness: Yes.

Q. I hand you purported copy of letter purported to have been sent by you, dated July 1, 1919, to John H. Fulton, Chairman of the Protective Committee for the 6½ per cent $50,000,000 credit, in care of National City Bank, and ask you if you signed and sent the original of which that purports to be a copy?

Mr. Conboy: I object to the question on the ground it is irrelevant and immaterial, whether he sent such a letter or not.

A. Yes, I believe substantially that is the letter I sent to Mr. Fulton.

(Discussion off the record.)

[fol. 34] Mr. Conboy: I move to strike that out upon the ground that is not the best evidence, and I renew my motion again to the admissibility of any such letter.

The Referee: I am not passing on that. The motion to strike the answer is denied, with an exception to the United States.

Q. You have read this copy of letter dated July 1, 1919, that I showed you?

A. Yes, I glanced over it.

Q. Will you state whether or not it is, to the best of your recollection, a true copy of a letter which you signed and delivered?

Mr. Conboy: I object.

The Referee: Sustained, as already covered.

Mr. Carson: I offer this letter which the witness has identified, in evidence.

Mr. Conboy: I object to it on the ground that it is——

The Referee: Are you familiar with its contents?

Mr. Conboy: No, sir, I am not.

The Referee: Do you wish to see it?

Mr. Conboy: Yes, but I object to it, in the first instance, on the ground it is incompetent. It is not the letter.

Mr. Carson: I can subpœna the bank's files and get the letter here.

Mr. Conboy: I presume so. In the first place, it is not competent. In the next place, what is written by this wit-
[fol. 35] ness to the Chairman of the Protective Committee of the National City Bank of New York is not relevant or material to any issue with which we are concerned here.

Mr. Carson: That was determined by the terms of the letter, in part, at least, I should think.

Mr. Conboy: Will counsel indicate what it is in the letter he regards as relevant and material to this issue?

Mr. Carson: I would say that the whole letter is, but I am particularly interested in the paragraph beginning "In view of the above" and what follows.

Mr. Conboy: I object to it, in view of what counsel has indicated, as being immaterial and irrelevant, that it is utterly irrelevant and immaterial.

The Referee: Mr. Carson, is this not res inter alios acta?

Mr. Carson: Not yet, your Honor; the actum is not complete yet. When it is complete I think you will see it is carried through and answered. Of course, I must introduce the evidence piece by piece. Mr. Conboy would object if I offered it all in a mass.

The Referee: All right; it will be received subject to a motion to strike.

Mr. Conboy: Exception. I want to know something about the manner in which these documents have been obtained, because there are some documents that we may be interested in if they turn up.

[fol. 36] The Referee: I will be obliged to sustain it on the best evidence rule, of course.

Mr. Carson: I ask to have it marked, with the understanding that I will substitute the original or account for its absence.

The Referee: It will be marked for identification.

Mr. Conboy: Then, it is not received in evidence now?

The Referee: It is not received in evidence.

(Copy of letter dated July 1, 1919, marked Defendant's Exhibit No. 1 for Identification.)

By Mr. Carson:

Q. Did you receive a reply to this letter, Mr. Ughet?

Mr. Conboy: That I object to on the ground it is immaterial, and irrelevant also.

The Referee: You are not objecting to the form of the question, are you?

Mr. Conboy: Oh, no.

The Referee: Overruled.

Mr. Conboy: Exception.

A. I did.

Q. Have you now access to the correspondence files which you maintained when Financial Attache of the Russian Embassy?

A. No.

Q. Where are those files now?

A. In the custody of the State Department.

[fol. 37] Q. I hand you a paper purporting to be a copy of a letter signed by J. H. F., addressed to yourself, dated July 11, 1919, and ask you whether you will read that and state whether that is a correct copy of the letter you received.

A. I believe that to be the essence of a reply received by me at the time.

Mr. Conboy: I move to strike out that statement.

Q. What do you mean by "essence of a reply" which you received?

Mr. Conboy: I move to strike that out.

The Referee: I will overrule the motion to strike out the answer.

Q. Will you explain what you mean by "the essence of a reply" which you received?

A. The substance, I mean to say. Of course, I couldn't say that that is the copy exactly of the letter received by me at the time. That is the substance of the answer, I recollect, as the one I got at the time.

Mr. Carson: I offer that paper in evidence.

Mr. Conboy: I object to it.

The Referee: Objection sustained, upon the ground that it is not the best evidence, which I understand is one ground upon which you——

Mr. Carson: Will Mr. Conboy produce Mr. Ughet's files out of the custody of the Government?

Mr. Conboy: We will not produce the files of a foreign [fol. 38] government, because I think that we are prohibited from doing that, but my objection is rather to relevancy and materiality in this instance than it is to competency.

Mr. Carson: On that statement I think your Honor might admit the letter.

Mr. Conboy: Won't you speak a little louder, because I do not hear the asides between yourself and the Referee, and I would like to be apprised of what you are saying from time to time.

Mr. Carson: It is not confidential.

Mr. Conboy: It may not be confidential, but it is not heard. That is the only objection I am making to it. I do not hear what you are saying.

The Referee: Yes, Mr. Carson, you should speak sufficiently loud so that all of us hear what you are saying.

Mr. Conboy: My objection, as to what Mr. Fulton wrote, is immaterial and irrelevant.

Mr. Carson: I am going to submit the enclosure.

The Referee: I understand that the Government declines to produce the original of this letter?

Mr. Conboy: Yes, you may so understand, sir.

The Referee: And that that is not——

Mr. Conboy: I have indicated already, your Honor, that I have not made objection to this upon the ground that it [fol. 39] is not the best evidence. My objection to it is that it is irrelevant and immaterial.

The Referee: It will be marked for identification for the present.

Mr. Carson: Your Honor is reserving a ruling on the offer?

The Referee: I sustain the objection to your offer in evidence at this time.

Mr. Carson: May I respectfully except?

(Letter dated July 11, 1919, from J. H. F. to Mr. Ughet, marked Defendant's Exhibit No. 2 for Identification.)

The Referee: You have stated here, as I understand it, a chain of correspondence that you will connect up?

Mr. Carson: Yes.

The Referee: You will have leave to offer the correspondence when you consider you have made your connection.

By Mr. Carson:

Q. Now, I hand you a paper purporting to be copy of a letter from Charles H. Sabin, as President of Guaranty Trust Company, to J. H. Fulton at the National City Bank, dated July 10, 1919, and ask you to read that and state whether you received a copy thereof at or about that time?

A. I believe, yes.

The Referee: When you say "I believe, yes," you mean that is to the best of your recollection?

[fol. 40] The Witness: Yes, sir.

Q. Was the copy which you received enclosed with the letter to you from Mr. Fulton, dated July 11, 1919, of which Defendant's Exhibit No. 2 for Identification purports to be a copy?

A. I believe, yes.

Q. You mean that that is so, to the best of your recollection, do you?

A. Yes.

(Discussion off the record.)

Mr. Carson: May the letter last referred to by the witness, dated July 10, 1919, be marked for identification?

The Referee: Yes.

(Letter dated July 10, 1919, marked Defendant's Exhibit No. 3 for Identification.)

The Referee: Are you familiar with the contents of Defendant's Exhibit No. 3 for Identification, Mr. Conboy?

Mr. Conboy: Yes, sir.

Mr. Carson: I renew my offer of Defendant's Exhibit No. 2 for Identification, and I offer in evidence with it this Exhibit 3 for Identification.

Mr. Conboy: And I object to it upon the grounds I have previously stated, and I object to it also upon the ground that it is an incomplete communication.

The Referee: Mr. Carson, this letter of June 9th that is [fol. 41] referred to, to the State Department at Washington, that has not been marked?

Mr. Carson: Not as yet, no.

The Referee: You intend to offer that?

Mr. Carson: I intend to offer that subsequently.

The Referee: I will sustain the objection at this time, with leave to renew your offer.

Q. I now hand you purported copy of letter from Charles H. Sabin to Frank L. Polk at the Department of State, Washington, dated June 9, 1919, and ask you whether you received a copy of that letter, to the best of your recollection, during or shortly after July, 1919?

A. I remember the fact of having received a letter, but I must admit I do not remember the contents.

Q. You state that you remember having received some letter from Mr. Sabin?

A. A letter accompanying this, but in perusing this letter I couldn't say whether it was this letter or not.

Q. Can you recall the contents of any other letter of which you received a copy at that time from Mr. Sabin to Mr. Polk, except the paper that you now have in your hands?

A. I may say simply that the Guaranty Trust Company was refusing to abide by the request addressed by me, but upon what grounds——

Mr. Conboy: I move to strike that out as attempting to characterize the communication.

The Referee: Motion granted.

[fol. 42] Q. I am simply asking, Mr. Ughet, having said you received some letter, but you cannot say if it is the paper in your hands, I want to know whether you can state the contents of any other letter which you received, a copy, from Mr. Sabin to Mr. Polk about that time than the paper you have in your hands?

A. No, I could not.

Q. Now, I hand you again Defendant's Exhibit No. 2 for Identification and Defendant's Exhibit No. 3 for Identification, and I call your attention to the last sentence of Defendant's Exhibit No. 3 for Identification, and ask you whether that refreshes your memory as to whether the paper dated June 9, 1919, last handed you is a copy which you received at the time?

A. Your Honor, I must repeat the same answer, that I remember the fact of having received a letter, but I do not recall the contents.

The Referee: You are referring now to this letter of June 9, 1919?

The Witness: Yes.

Mr. Carson: I ask to have the letter last referred to marked for identification.

The Referee: It may be so marked.

(Letter dated June 9, 1919, marked Defendant's Exhibit No. 4 for Identification.)

Q. Mr. Ughet, have you retained any copies of any letter which you may have received from Mr. Fulton enclosed with a letter of July 11, 1919, to you?

A. None aside from my former official files.

Q. All those files were turned over by you to the State [fol. 43] Department of the United States, were they?

A. Yes.

Mr. Carson: I now renew the offer in evidence of Defendant's Exhibits Nos. 2 and 3 for Identification.

Mr. Conboy: Same objection.

Mr. Carson: I state that an examination of the Guaranty Trust Company's files does not disclose any other letter of June 9, 1919, from Mr. Sabin to Mr. Polk than that which has been marked Defendant's Exhibit No. 4 for Identification.

The Referee: Is the form of that satisfactory to you, Mr. Conboy?

Mr. Conboy: You mean, do I accept the statement?

The Referee: Do you accept that as a fact, as to the files?

Mr. Conboy: That no other letter from Mr. Sabin to Mr. Polk is in the files of the Guaranty Trust Company except this copy of letter of June 9, 1919?

Mr. Carson: Exhibit 4 for Identification.

Mr. Conboy: Yes, I will accept that statement. I will accept Mr. Carson's statement to that effect.

The Referee: I would like to hear you, Mr. Carson, as to the materiality of these papers, Exhibits Nos. 2 and 3.

Mr. Carson: If your Honor will take them in connection with Exhibit No. 1 for Identification, which has not yet been received in evidence, awaiting production of the original.

[fol. 44] That is the demand on the Guaranty Trust Company through the Protective Committee.

The Referee: My difficulty——

Mr. Conboy: I will withdraw my objection with regard to the competency of Exhibit 1 for Identification upon the ground that it is not the best evidence that the original is not produced, for the purpose of enabling your Honor to rule upon the offer of the letter itself, that is, as if the original were produced.

(Discussion off the record.)

The Referee: Mr. Carson, the difficulty that I have as to admitting these letters is that they do not seem to be directly transactions between the bank, where the deposit was made, and the persons having authority to draw on the deposit.

Mr. Carson: Your Honor will not allow me to connect the evidence through this witness and to show that the National City Bank did write a letter to the Guaranty Trust Company, enclosing Mr. Ughet's letter. This witness would not know anything about that.

The Referee: That would not be of any importance, unless that act of the National City Bank was an act as the agent of Mr. Ughet.

Mr. Carson: Very well, sir.

The Referee: The mere fact that they forwarded a copy [fol. 45] of correspondence for his information would not be a transaction between the two.

Mr. Carson: And requested the Guaranty Trust Company to comply with this request. That will be the substance of the proof. Here we are only taking evidence that this witness can give with reference to the matters that passed through his hands. I can conceive that these three letters within themselves, and not more, would not authorize judgment dismissing the complaint, under the Statute of Limitations. We expect to complete them by correspondence between the National City Bank and the Guaranty Trust Company, based on Mr. Ughet's letter, Exhibit 1 for Identification.

I take it your Honor's question, therefore, really is whether the letter, Exhibit 1 for Identification, authorized National City Bank or the Protective Committee to write a letter to Guaranty Trust Company which could be answered by Exhibit 2 and Exhibit 3.

The Referee: Yes, that is substantially it. On the present state of the record, I sustain the objection. These exhibits marked for identification will, of course, be part of the record, and the Court can see them in passing on the motion.

Mr. Carson: I take it your Honor's policy as Referee is simply to mark material for identification for submission to the Court upon the submission of the deposition?

The Referee: I have not stated any general policy except [fol. 46] with respect to these letters. They have been marked for identification, and anything that is marked for identification, I assume, will be available for you to show the Court, which may take a different view of the matter than I do.

Mr. Carson: Does your Honor care to hear me further on the relevancy and materiality of these letters?

The Referee: Yes, I would be glad to. Shall we have it off the record?

Mr. Carson: Yes.

(Discussion off the record.)

By Mr. Carson:

Q. Mr. Ughet, I forgot to ask you, at or before the time of your writing the letter of July 1, 1919, to Mr. Fulton, Chairman of the Protective Committee, of which Exhibit 1 for Identification purports to be a copy, did you have a conference on the subject with Mr. Sabin of the Guaranty Trust Company?

Mr. Conboy: I object to it upon the ground it is immaterial and irrelevant whether he did or did not.

The Referee: Overruled.

Mr. Conboy: Exception.

Q. Answer "yes" or "no".

A. No.

Q. I would like to ask you again to search your recollection, Mr. Ughet, and state whether, in writing to the Pro- [fol. 47] tective Committee with respect to the use of funds to pay on the $50,000,000 credit, you did not address Guaranty Trust Company directly in one way or another?

A. You see, as far as I remember, there was a kind of a conference of bankers interested in the issue of those 6½

per cent participation certificates, and that representative of the Guaranty Trust Company was present at this conference.

Q. Were you present?

A. Yes.

Q. Who was the representative of the Guaranty Trust Company who was present?

A. I do not remember that.

Q. Do you remember whether or not it was Mr. Sabin?

A. No.

Q. Now, apart from that conference which you have just mentioned, did you have a personal conference with Mr. Sabin with respect to the request contained in Defendant's Exhibit No. 1 for Identification?

A. I think not.

Q. When did the conference of bank representatives which you have mentioned take place, to the best of your recollection?

A. Some time before July 10th, before the due date.

Q. 1919?

A. 1919.

Q. Where did it take place?

A. At the National City Bank.

Q. Was anything said by you or by the man whom you have described as a representative of the Guaranty Trust Company, to your recollection, with respect to the payment out of the Ministry of Finance account upon or to the order of the Government of Russia?

A. I believe not.

[fol. 48] Q. Did you participate in any discussion toward the end of 1921 with respect to the use of Russian funds in this country for the financing of Russian relief?

Mr. Conboy: I object to that on the ground it is not comprised within these issues.

Mr. Carson: It is preliminary.

The Referee: I think I will overrule the objection on that ground.

Mr. Conboy: Exception.

Q. You may answer.

A. To the best of my recollection, not.

Q. Do you recall the occasion toward the end of 1921, when efforts were made in this country to raise funds for Russian relief?

A. I do.

Mr. Conboy: Wait a minute. I object on the ground it is immaterial and irrelevant. I cannot conceive how it could have the slightest relevancy or materiality.

The Referee: It is evidently preliminary. I will overrule the objection for that reason.

Mr. Conboy: Exception.

A. I do.

Q. Did you authorize or request the State Department to write to the Guaranty Trust Company at that time with reference to the use of the Ministry of Finance account here involved, or part of it, for that purpose?

Mr. Conboy: I object to it.

The Referee: Sustained.

[fol. 49] Q. Did you have any conversation with anyone in the State Department at Washington toward the end of 1921, with respect to the use of the Ministry of Finance account here involved?

Mr. Conboy: I object to it.

The Referee: It may be answered "Yes" or "no."

Mr. Conboy: Exception.

A. No.

Q. I hand you a paper purporting to be copy of a letter from Charles H. Sabin to Hon. Charles E. Hughes, Secretary of State, dated December 9, 1921, and ask you to read it and state whether or not you received a copy of that letter, or learned its contents, at or about that date?

Mr. Conboy: I should object to it upon the ground it is irrelevant and immaterial, whether he received a copy of it or learned of its contents.

The Referee: Overruled.

Mr. Conboy: Exception.

A. I have received no copy of this letter, but, to my recollection, I learned, whichever it was, at the end of 1921 or in the early part of 1922, that the Guaranty Trust Company was——

The Referee: Not the contents of it. The question was whether you knew of its contents at that time.

The Witness: The contents of the letter? Then, I have to answer in the negative.

[fol. 50] The Referee: You did not know of the contents?

The Witness: No, sir.

Q. You are referring to this particular letter of December 9, 1921, which I have shown you?

A. Yes.

Q. Were Coudert Brothers, the attorneys of the Russian Embassy in New York, in 1917?

A. Yes, sir.

Q. Did you know Mr. Grayson M.—P. Murphy at that time?

A. Yes.

Q. And you knew Mr. Albert Breton, vice-president of the Guaranty Trust Company?

A. Yes.

Q. Did your title as a diplomatic representative of the Russian Government change after the resignation of Mr. Bakhmeteff?

A. No.

Q. In your capacity as Financial Attache to the Russian Embassy, did you know after the year 1917 whether or not the Guaranty Trust Company would pay upon the order of the Russian Government, the Ministry of Finance account here involved?

Mr. Conboy: I object to that because that will call for his inferences or deductions or conclusions with respect to matters that are not in evidence. Whether he surmised it or inferred it is not, of course, material or relevant.

The Referee: Objection sustained to that question.

Q. After the Soviet revolution in 1917, did you have one or more conferences with officers of Guaranty Trust Company with respect to payment of this Ministry of Finance [fol. 51] account to the Ambassador or to the Russian Government?

The Referee: That calls for a "yes" or "no" answer.

A. Yes.

Q. How many would you say you had?

A. You mean after 1917, in general?

Q. Yes, in general, with the Guaranty Trust Company, on the subject.

A. I should say probably three or four.

Q. With what individual officers of the Guaranty Trust Company did you confer on the subject?

A. To my best recollection, with Mr. Sabin.

Q. You have no recollection of anyone else?

A. You mean on this specific matter?

Q. On this specific matter, yes.

A. On this specific matter, I believe not.

Q. Will you state the substance of what Mr. Sabin said to you in those conversations as to whether or not Guaranty Trust Company would make payment to the order of the Russian Government out of this Ministry of Finance account?

Mr. Conboy: And that I object to, if the Court please, upon the ground that such a conversation would be binding not upon the Guaranty Trust Company at all. As to whether they disclaimed liability upon an account, that depends upon the statement of an officer of the corporation.

Mr. Carson: That I think we might reserve for the argument on the law.

[fol. 52] Mr. Conboy: I am making my objection to it now because the question has been asked, and I regard the question as objectionable.

The Referee: I shall sustain the objection, Mr. Conboy, but not on that ground. I think we should have more circumstance as to time, place and date.

Q. Mr. Ughet, will you state the times and places of those conversations with Mr. Sabin, as nearly as you can remember?

A. My first conference with Mr. Sabin took place in his room at the Guaranty Trust Company in the very first days of December, 1917, when first I brought to Mr. Sabin a copy of a letter addressed by the Ambassador to the National City Bank, and dated November 28, 1917, and I left a copy of this letter with Mr. Sabin. At that time he was absolutely non-committal and simply told that the matter will be considered and that an answer will be given me.

Q. Was an answer given you?

A. In writing, yes.

Q. Before we come to that, will you state the times and places of any other conversations with Mr. Sabin on the subject?

A. Subsequent to that I recall just this short conference in Mr. Polk's office in Washington.

Q. Which you have already described?

A. Yes.

Q. That took place, you stated, early in 1918 or the end of 1917?

A. Either the latter part of December, 1917, or in the early part of January, 1918.

Q. What further conversations did you have, and when and where?

A. I must confess that outside of that, I have no recol- [fol. 53] lection of definite conversation on definite dates and at definite places.

Q. Just to be sure I have your full recollection on the subject, I want again to ask you, Mr. Ughet, whether in connection with the letter which you wrote the Protective Committee at National City Bank, which has been shown to you, you did or did not discuss with Mr. Sabin the contents of that letter, or a similar request as contained in that letter, at the Guaranty Trust Company?

A. I did not discuss the letter with Mr. Sabin. About that I am quite positive.

Q. Did you have a conference with him before sending the letter?

A. It could so happen, because my relations with Mr. Sabin were friendly, and perhaps the question was broached, but I couldn't say that I recollect that formally, I should say, I took up the letter with him.

Q. Did you have a conversation with him prior to the sending of the letter?

A. Very possibly, but I do not recollect that as a definite fact.

Q. Mr. Ughet, you referred to leaving a copy of letter with Mr. Sabin early in December of 1917. I hand you a purported copy of letter in two pages, dated November 28, 1917, and ask you whether that is the paper you left with Mr. Sabin?

Mr. Conboy: I take it this question is preliminary?

Mr. Carson: Yes.

A. Yes, I believe that is the letter, or a copy.

Q. What did you say to Mr. Sabin, if anything, when you left him that copy?

[fol. 54] Mr. Conboy: Objected to on the ground it is immaterial and irrelevant. It is utterly incompetent on what we have to deal with in this case.

The Referee: There has not been any reference to the paper yet, except as fixing a time. I will have to hear the answer, I think, and overrule the objection.

Mr. Conboy: Exception.

A. In view of the fact that on the strength of this letter of November 28, 1917, certain arrangements were made between the Ambassador and the National City Bank, so in leaving a copy of this letter with Mr. Sabin, I asked him whether the Guaranty Trust Company would not be willing just to adopt the same attitude towards this Ministry of Finance account with them as the National City Bank adopted its attitude towards the Russian Government funds with the National City Bank.

Q. You previously said that Mr. Sabin gave you no answer at that time; is that right?

A. A non-committal answer, and he promised to write me on the subject.

Mr. Carson: I offer this letter to be marked for identification.

(Letter dated November 28, 1917, marked Defendant's Exhibit No. 5 for Identification.)

Q. I hand you purported copy of letter from Charles H. Sabin, as President of Guaranty Trust Company to your-[fol. 55] self, dated December 12, 1917, and ask you to read that and state whether you received the original.

A. Yes, these are the contents of a letter I received at the time.

Mr. Carson: I ask to have that marked for identification.

(Letter dated December 12, 1917, marked Defendant's Exhibit No. 6 for Identification.)

Mr. Carson: I think that is substantially all my direct examination. I would like to reserve the question of again tendering these exhibits marked for identification and not admitted by your Honor.

The Referee: You have not tendered 5 and 6. I have no ruling in respect to those.

Mr. Carson: I have not. I would also like to reserve the right to supplement the examination upon reading the transcript of the minutes.

Mr. Conboy: I think perhaps we will reserve our cross-examination until you finish.

The Referee: I see no reason for that, Mr. Conboy.

Mr. Conboy: I think I prefer to cross-examine at the conclusion of the direct examination. I think that is ordinarily my right.

Mr. Carson: I think this is the conclusion of the direct examination.

Mr. Conboy: No, I understand it is not. I understand [fol. 56] counsel wants to ask some further questions. If you do not intend to ask——

The Referee: Will you read back to me, please, Mr. Stenographer, what the reservation is?

(Record repeated.)

The Referee: It is undoubtedly Mr. Conboy's right to wait until you conclude.

Mr. Carson: I will state that I have concluded. I also give notice that if I find my direct is lacking in some particular, I will ask your Honor to reopen it, but I have substantially concluded, and that is what I intended to say.

The Referee: Of course, so far as questions are concerned, you are either through or you are not. If you reserve the right to read the transcript and then ask further questions, of course, Mr. Conboy is entitled to wait.

Mr. Carson: I am making no reservation of any kind, except I request to reserve the right to argue the question of admissibility of documents already identified.

The Referee: I think that may be done.

Mr. Conboy: I move to strike out the testimony of the witness regarding the conversation between himself, Mr. Sabin and Mr. Polk that took place in the State Department in Washington, upon the ground that under the circumstances disclosed, the statements made by Mr. Sabin [fol. 57] at that time in answer to any inquiry of Mr. Polk, are not relevant or material to, and not competent upon, the issues that are involved in this case.

The Referee: Decision reserved.

Mr. Conboy: And I further move to strike out any comment that the witness himself made with regard to the

statements made by Mr. Sabin at that time, on the ground that they are not competent evidence.

The Referee: I am not sure that I know the portion of the testimony that you are now referring to, Mr. Conboy.

Mr. Conboy: Will you go back and read that testimony, if you please, so that we may have no misunderstanding upon it? I think it is in the early part of the testimony.

The Referee: I did not understand that I had admitted any comment on the part of the witness. You mean at the conversation?

Mr. Conboy: What is in the nature of a comment by the witness.

Mr. Carson: I do not think there was any such thing.

The Referee: I would like to have it identified.

(Answer repeated as follows: "A. At this conference Mr. Polk asked Mr. Sabin whether the Guaranty Trust Company would consent to release this fund to the jurisdiction of the Russian Embassy, and Mr. Sabin pointed out that because the Guaranty Trust Company was having certain claims against Russia in consequence of November [fol. 58] events of 1917, that the Guaranty Trust Company, therefore, was not feeling at liberty to release this fund to the jurisdiction of the Russian Embassy.")

Mr. Conboy: I move to strike that out on the ground that it is not relevant or material, as well as not competent. What Mr. Sabin said with regard to what the Guaranty Trust Company did with respect to a release of those funds to the Russian Embassy certainly cannot be claimed to be binding upon the Guaranty Trust Company; and in the next place, what Mr. Sabin said would be done with reference to the release of funds to the Russian Embassy that stood to the credit of the Ministere de Finance Section Etrangere is not relevant or material, so I object to it upon the grounds of incompetency, irrelevancy or immateriality, and I move to strike out upon those grounds.

The Referee: It is not disputed that Mr. Sabin was President of the Guaranty Trust Company at that time, is it?

Mr. Conboy: I presume he was President at that time. I see a letter from him in 1917 signed by him as President, and another letter later as Chairman of the Board. Whether he was President or Chairman of the Board at that time, I do not know, but I think he was President.

Mr. Carson: He was President.

Mr. Conboy: Apparently he was President again in 1919.
[fol. 59] The Referee: Of course, what I have in mind, Mr. Conboy, is the presumption which attaches to the acts of a president, that he can speak for his company, if he purports to do so, as apparently he did here. I will deny the motion which you made, in fact, all of the motions just made at the conclusion of the witness's direct examination, except that I will reserve decision as to the competency of this witness in view of his official status. As to that, I would like to be enlightened by authority, if it is available.
Mr. Carson: Off the record.

(Discussion off the record.)

Cross-examination.

By Mr. Conboy:

Q. Mr. Ughet, were you at any time the Ministere des Finances, Section Etrangere?
A. No, sir.
Q. Did you at any time have any right to sign checks on any account that was standing to the credit of the Ministere des Finances, Section Etrangere?
A. With the Guaranty Trust Company?
Q. With the Guaranty Trust Company.
A. No, sir.
Q. And the account which we have been speaking of with the Guaranty Trust Company was an account that stood to the credit of Ministere des Finances, Section Etrangere, was it not?
A. Yes.
Q. With respect to that account, as I understand it, you had no right to sign any checks whatever, did you?
A. No.
[fol. 60] Q. And you had no right to draw upon that account at all, did you, Mr. Ughet?
A. No.

Mr. Conboy: Will you go back, Mr. Stenographer, and read the record after what you read before?

(Record repeated.)

Mr. Conboy: That is all.
The Referee: That concludes the cross-examination?
Mr. Conboy: Yes, sir.

(Whereupon, at 4:45 P. M., an adjournment was taken to Friday, May 10, 1935, at 2:30 P. M.)

[fol. 61] DEPOSITION OF SERGE UGHET

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

Docket 59, p. 80

UNITED STATES OF AMERICA, Plaintiff,

against

GUARANTY TRUST COMPANY OF NEW YORK, Defendant

#70 Pine Street, New York City,
September 17, 1935, 2:30 P. M.

Before Harold Harper, Esq., Referee

Appearances:

Hon. F. W. H. Adams, United States Attorney, by Leon E. Spencer, Esq., Assistant United States Attorney.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., by Ralph M. Carson, Esq., of counsel, attorneys for defendant.

Coudert Brothers, Esqs., by Mahlon B. Doing, Esq., of counsel, attorneys for Boris Bakhmeteff.

[fol. 62] Mr. Spencer: Before proceeding I suppose I ought to call your Honor's attention to something I entirely overlooked before, namely, that Mr. Conboy declined to go ahead with the examination of Mr. Bakhmeteff, the cross-examination, unless Mr. Carson stated that he had finished with his direct examination. Mr. Carson has just told me that he wants to ask some additional questions. The same remark applies to Mr. Ughet's testimony, Mr. Conboy declined to go ahead.

My sole purpose is to limit the extent of the redirect examination, the nature of which I am not familiar with at the moment, and I would not want it to run into a redirect of the whole situation.

The Referee: One of the objects of appointing a Referee is to obtain a little freer modus operandi, other than you

get in court, and I should be inclined to permit any examination and to reopen for that purpose if there is anything of importance to be brought up on either side. Do I understand that Mr. Ughet has not been cross-examined at all?

Mr. Carson: He has been cross-examined for a bit.

Mr. Spencer: Mr. Conboy at the time said that he did not wish to go ahead with the cross-examination unless he was advised that he was finished.

The Referee: Are you prepared to cross-examine Mr. Ughet today?

[fol. 63] Mr. Spencer: Unless it is on matters taken care of before.

The Referee: This is some point that has not yet arisen. Suppose we wait and see how far Mr. Carson goes.

SERGE UGHET, resumed the stand and testified further as follows:

Redirect examination.

By Mr. Carson:

Q. Mr. Ughet, do you recall the letter which you wrote under date of July 1, 1919, to the Protective Committee and which has been marked Exhibit No. 1 for Identification?

A. Yes, I remember.

Q. I merely want to ask you in connection with that letter whether you knew at the time that the Guaranty Trust Company was a member of the syndicate of banks referred to in that letter. To put my question otherwise, who were the members of that syndicate of banks?

Mr. Spencer: Of course, this question is based upon his knowledge as of that time and not as of today.

Mr. Carson: That is right.

A. The members of the Protective Committee were the members of the so-called Russian group of banks.

Q. I asked you who were the members of the syndicate re-
[fol. 64] ferred to in that letter. A. I will try to remember who composed this Russian group. There was the National City Bank, Morgans, Guaranty Trust, Kidder, Peabody, Lee Higginson, and a sixth one.

Q. You knew that at the time?

A. Oh, yes.

Q. At the time of writing that letter, Exhibit 1 for Identification, did you know whether or not an officer of Guaranty

Trust Company was a member of the Protective Committee to which the letter was addressed?

A. No.

Q. Did you know who was the paying agent of the loan described in that letter, and if so, who was it?

A. Either I did not know or I do not remember now. Who was the paying agent I do not know.

Q. At page 44 of the minutes you referred to a conference of bankers interested in the issue of those 6½ per cent participation certificates, and you said that you were present at that conference. Do you recall that in general?

A. About the fact of such a conference?

Q. Yes.

A. Yes.

Q. Would you state to the best of your recollection what took place at that conference?

A. No, I do not remember. I remember the fact of the conference. At any rate, I do not want to be understood that it was a conference of the bankers dealing with the ways how best to protect the holders of 6½ per cent Imperial bonds. It was some kind of a conference relating to this issue, but what exactly was treated at this conference, that I do not remember.

Q. Did you know Mr. Harold Stanley?

A. No.

[fol. 65] Q. Have you read the copy of letter from Mr. Sabin to Mr. Polk, dated June 9, 1919, Exhibit 4 for Identification?

A. Yes, it was shown to me in May.

Q. You have read it?

A. Yes, at that time.

Q. Will you read it again?

A. Yes.

Q. I previously asked you whether you had seen a copy of that letter at or after that time, and you testified, if I recall, that you could not remember having seen a copy of that letter. Is that right?

A. That is correct.

Q. I now want to ask you whether you learned the contents or substance of that letter in any way at that time or thereafter.

Mr. Spencer: Up until today?

Mr. Carson: Up until 1923.

A. To my recollection I did not know the contents of this letter.

Q. Did the officials of the Russian Embassy under you, as far as you know, learn the contents of that letter at that time and up until 1923?

Mr. Spencer: I object. Did his subordinates learn of it is rather an objectionable question. He cannot speak for them.

The Referee: I think I will have to take the answer and then you may inquire on cross as to what his information was. Possibly we shall then have to strike out the answer that we now receive. Objection overruled.

A. Of course, I may speak on assumption only—

[fol. 66] The Referee: Do not speak on assumption. You are being asked with regard to your knowledge.

By Mr. Carson:

Q. If you know, whether or not your subordinates after that time up until 1923 learned the substance of that letter in any form?

A. That I do not know.

Q. I now direct your attention to Defendant's Exhibit 7 for Identification, a copy of letter from Mr. Sabin to Secretary Hughes, dated December 9, 1921.

A. Yes, I remember. It was shown to me in May.

Q. You recall I previously asked you whether you had seen a copy of that letter or the original of that letter, and you replied "no."

A. That is right.

Q. I now want to ask you whether you in any form learned the substance of that letter as a statement of the Guaranty Trust Company at or about that time?

A. No, I did not.

Q. Were the statements contained therein, whether the substance of a letter or not, brought to your knowledge at that time or about that time?

A. I may say that some time after December, 1921, I knew that some approach was made to the Guaranty Trust Company and that the Guaranty Trust Company refused to part with the $5,000,000 fund.

Q. Can you recall at this time how and when you acquired the knowledge you speak of?

A. No.

Mr. Carson: That is all the questions I have of this witness.

[fol. 67] Recross-examination.

By Mr. Spencer:

Q. Mr. Ughet, you have testified on direct that you were aware of the members of the banking syndicate to which Mr. Carson referred. From what source did you get that information?

A. From my general conversations with bankers at the time.

Q. You have also testified that in connection with this letter from Mr. Sabin to Mr. Hughes, the Secretary of State, you were aware of the contents of that letter?

A. No.

Q. When did your information that the Guaranty Trust Company had refused to give up the $5,000,000 fund come to your attention?

A. Your question refers specifically after December, 1921, or in a general manner? The first time it came to my attention in December, 1917.

Q. My question refers to your answer to Mr. Carson's question and I am trying to place the date of that answer.

A. I could not say any more definitely than it was after December, 1921.

Mr. Spencer: That is all.

Redirect examination.

By Mr. Carson:

Q. When you say that you learned that an approach was made to the Guaranty Trust Company, can you specify any more as to who made the approach according to your knowledge?

A. The United States Government, but what exact branch of the Government, that I would not know.

[fol. 68] Q. And this approach was made with the knowledge and the approval of the Embassy?

A. I do not think so.

Mr. Carson: I have no more questions.
Mr. Spencer: No further questions.

S. Ughet.

Sworn to before me this 19th day of September, 1935.
Matthew V. Stepsis, Notary Public, Kings County.
(Seal)

(It is stipulated that the witnesses may subscribe and swear to their depositions after reading the same before any notary public of New York County, with the same force and effect as if subscribed and sworn to before the Referee.)

[fol. 69] In United States District Court

[Title omitted]

Deposition of Boris Bakhmeteff

No. 70 Pine Street, New York City,
May 10, 1935, 2:30 P. M.

Before Harold Harper, Esq., Referee

Appearances:

Hon. Martin Conboy, United States Attorney, by Leon E. Spencer, Esq., Assistant United States Attorney; Henry Munroe, Esq., United States Treasury Department, Washington, D. C., for the Plaintiff.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Ralph M. Carson, Esq., of counsel, Attorneys for Defendant.

Coudert Brothers, Esqs., by P. A. Shay, Esq., of counsel, Attorneys for Boris Bakhmeteff.

[fol. 70] Deposition of Boris Bakhmeteff, taken pursuant to order of Hon. Francis G. Caffey, United States District Judge, dated April 30, 1935.

The Referee: At the conclusion of yesterday's session there was still open a motion by the United States to strike out the testimony of Mr. Ughet on the ground that the transactions as to which he was called upon to testify were privileged and that privilege could be raised by the United States. That motion will be denied.

Mr. Spencer: Exception.

Mr. Shay: I wonder if, in the interest of expediting this matter, I may be permitted to make a short statement for the witness.

The Referee: Surely, Mr. Shay.

Mr. Shay: Mr. Referee, I am appearing as counsel for the witness, Mr. Bakhmeteff, who was, as you know, the Russian Ambassador to the United States between 1917 and 1922.

I have learned that Mr. Carson proposes to interrogate Mr. Bakhmeteff as to matters which clearly pertain to the governmental business which Mr. Bakhmeteff was transacting for the Russian Government at the time he was the Ambassador.

I take the position that under the authorities and under the United States statutes, an Ambassador from a foreign country to the United States is entitled to claim privilege as to these transactions, and it is my view that the witness cannot be required to give testimony unless his sovereign waives the privilege which he undoubtedly is entitled to receive.

[fol. 71] Later on we may change this position if the Government of the United States, through the Government attorneys, asks Mr. Bakhmeteff to give testimony with regard to the matters about which he may be questioned.

The Referee: Well, I should be glad to be directed by anybody to any authorities which are controlling in this situation.

Mr. Shay: Perhaps I should have explained that my partner, Mr. Mahlon B. Doing, has been acting as counsel for Mr. Bakhmeteff and has a more intimate knowledge of these matters than I have. Unfortunately, Mr. Doing was obliged to go to Washington today. And I believe he tried to arrange for a postponement of this hearing with Mr. Carson——

Mr. Carson: That is right:

Mr. Shay: But Mr. Carson took the position that a postponement could not be permitted. Mr. Doing has drawn my attention to the case of Torlade v. Barrozo, 1 Miles (Penna.), 366; and he has also drawn my attention to a case in 24 Federal, at page 1084, and to 22 U. S. C. A., Sections 251 to 255, inclusive.

The Referee: Now, I will be glad to examine those. I think perhaps if we take a brief recess at this point, and I will examine those cases, I think that would probably be——

Mr. Carson: More expeditious.

The Referee: Yes. All right, if that is convenient to everybody, we will recess, we will say for fifteen minutes.

Mr. Shay: Mr. Referee, may I speak off the record now?

[fol. 72] The Referee: Yes.

(Discussion off the record. Recess taken.)

Mr. Carson: Before there is any ruling on Mr. Shay's objection, may I note for the record objections to your Honor entertaining that objection, as follows: First, that it is an objection which cannot be raised by the witness or his counsel, who is not a party to this proceeding; second, that it is an objection which was in effect determined and disposed of, or waived, upon the motion which the defendant made for leave to take this deposition, on the papers for which motion it was fully disclosed that Mr. Bakhmeteff was to be examined as a former Russian Ambassador; third, that the objection, if made at all, can be taken only by motion to quash the subpoena which has been served on this witness. That motion has not been made, and thereby the objection waived. And fourth, that the matter to be examined into is not a matter of sovereign interest or importance but is a matter in which the sovereign was involved in a proprietary or quasi-proprietary capacity.

Mr. Shay: In reply to Mr. Carson's statement, your Honor, may I say that Mr. Bakhmeteff had no knowledge regarding the nature of this proceeding except the knowledge which he was able to glean from the subpoena which was served upon him. And therefore, of course, it cannot be said that he has waived any of his rights. And moreover, our position is that he is not in a position to waive his rights, that only his sovereign is in a position to do that.

[fol. 73] The Referee: Mr. Bakhmeteff by advice of counsel has taken the position that he is not subject to any inquiry in this reference whatever. This objection was taken at the outset and before he was sworn.

I am directing Mr. Bakhmeteff to submit to a preliminary examination for the purpose of determining whether his status is such as to entitle him to diplomatic immunity. And in making this direction it is understood, and I understand conceded by the defendant, that in submitting to this limited examination Mr. Bakhmeteff is not in any way waiving the claim of privilege which he has made at the outset.

Will you raise your hand and be sworn, Mr. Bakhmeteff.

BORIS BAKHMETEFF, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Carson:

Q. Mr. Bakhmeteff, when did you resign as Russian Ambassador to the United States?

A. In June, 1922. I don't remember exactly the date. It was in June, 1922.

Q. Did you resign by written letter, or in what form?

A. Yes, I did resign by written letter, on invitation of the State Department.

Q. Was the invitation of the State Department to you in writing or oral?

A. No, it was informal.

Q. After resigning have you handled the affairs of the [fol. 74] Russian Government in this country?

A. No.

Q. Upon resigning did you receive your diplomatic passports from the United States?

A. I don't think the American Government had any of my passports. They did not have anything to return to me.

Q. Did they give you a diplomatic passport to return to Russia?

A. They did not give me any, and I did not ask for any.

Q. Where did you reside at the time of your resignation?

A. In Washington, D. C.

Q. Where do you reside now?

A. In New York City.

Q. How long have you resided in New York City?

A. Since 1922.

Q. What is the place of your residence here?

A. 876 Park Avenue.

Q. How long have you been at that address?

A. Since September this year,—1934.

Q. Prior to September, 1934, where did you reside?

A. 55 East 72nd Street.

Q. How long did you reside there?

A. About three years.

Q. And prior to that did you reside at other addresses in New York City?

A. Yes.

Q. Since 1922?

A. Yes.

Q. What is your occupation at the present time?

A. Consulting engineer.

Q. Do you have clients who consult you in that capacity in this country?

A. Well, a limited number of clients, yes.

Q. Do you have a position with Columbia University?

[fol. 75] A. Yes, I am Professor of Civil Engineering.

Q. How long have you been such professor?

A. Three or four years; I don't remember exactly.

Q. Have you a business address in New York City?

A. Yes.

Q. What is that address?

A. 250 West 57th Street.

Q. How long have you had that business address?

A. Since 1925, I think.

Q. And will you describe briefly the nature of the business that you conduct at that address?

A. Engineering consultation, and mostly advising on manufacturing. And I am Chairman of the Lion Match Company.

Q. Are you an American citizen?

A. No.

Q. Have you applied for citizenship?

A. Yes.

Q. When did you apply?

A. About two years ago.

Q. Have you received your first papers?

A. Yes.

Mr. Carson: That is all. On that record I submit the witness should be examined with respect to the subject of this inquiry.

Mr. Shay: And I renew my statement that the witness ought not to be required to give testimony regarding matters pertaining to the business of his sovereign.

Mr. Spencer: If your Honor please, I wish the record to show that the United States Government reasserts the right to and does object, to continued questioning with re-

[fol. 76] upon the same grounds as were more fully stated by Mr. Conboy yesterday; and I don't need to restate them in any detail.

The Referee: Have you any questions to put,—has anyone any questions to put to the witness as to his present personal status?

Mr. Shay: I haven't.

The Referee: Have you, Mr. Spencer?

Mr. Spencer: No, I have not.

By Mr. Carson:

Q. Mr. Bakhmeteff, I would like to ask you directly, do you claim to be an Ambassador or former Ambassador of the Government of Russia in process of returning to Russia?

Mr. Shay: I object to that.

The Referee: I will sustain the objection to that. I don't think it is necessary.

Upon the record that has been made I shall rule that the witness is not immune from the process of this Court, and that having been duly subpœnæd, he is obligated to give testimony as any other witness. As to the objections that have been raised as to the transactions, a ruling will be made on them as the questions are presented.

You may proceed.

Mr. Shay: Your Honor, may I inquire whether—perhaps it is your desire that we proceed to a specific question and [fol. 77] then submit that to the Court for its ruling, if you elect to get the Court's opinion on the question. Or do you prefer to have this hearing adjourned at this time?

The Referee: Well, I should prefer to reach a point where some question is raised,——

Mr. Carson: I should think that would be more orderly.

The Referee (continuing): —suitable for review.

Mr. Shay: Well, without waiving any of our rights, of course, I am quite in accord with your views.

Mr. Spencer: I would like the record to show that the Government has an exception to your ruling.

Mr. Shay: I likewise, in the case of Mr. Bakhmeteff.

The Referee: Very good.

Mr. Carson: And, as exceptions are taken, may I take an exception to your Honor's ruling on my objections to your Honor entertaining that objection.

The Referee: Very well. Everybody has an exception except the Referee and the stenographer.

By Mr. Carson:

Q. Mr. Bakhmeteff, you were Russian Ambassador to the United States during the period 1917 to 1922, were you?

A. Yes.

Q. I understand that about December 3, 1918, you tem-
[fol. 78] porarily left your position to go to France. Is that correct?

A. That is correct.

Q. And how long did you remain out of the United States?

A. Until July, 1919.

Q. Mr. Serge Ughet was Financial Attache of the Russian Empire during the period of your service as Ambassador, was he?

A. Yes, sir.

Q. And during your absence from the country I understand he was Charge d'Affaires, is that correct?

A. Yes, sir, that is correct.

Q. After the Soviet revolution you continued your functions as Ambassador of the Russian Government in this country?

A. Yes.

Q. Until your resignation?

A. Yes.

Q. In your capacity as Ambassador, were you familiar with the existence of an account standing with the Guaranty Trust Company of New York in the name of a department of the Russian Government?

Mr. Shay: I respectfully object, your Honor, on the ground that this distinctly pertains to the business of the Russian Government, and this is the type of question which I feel the former Ambassador should not be obliged to answer.

Mr. Carson: Well, he is just being asked so far if he was aware of the fact. I don't think that is very injurious.

Mr. Shay (to the stenographer): Will you read the question?

(Question read by the stenographer.)

The Referee: I will overrule the objection to that.

Mr. Shay: Exception.

[fol. 79] The Witness (answering): In a general way, I knew, of course; not details.

Q. Was the title of that account Ministere de Finance Section Etrangere?

A. I couldn't tell you that. I didn't know the account.

Q. Did you know the approximate balance of that account at the end of the year 1917? Just say "yes" or "no".

Mr. Shay: I renew my objection, Mr. Referee. And if you rule against me on this objection, may I have a continuing objection to all of the questions which are being asked pertaining to the business and affairs of the Russian Government?

Mr. Spencer: The Government objects to this question.

The Referee: Off the record.

(Discussion off the record.)

By Mr. Carson:

Q. In your capacity as Ambassador did you learn that Guaranty Trust Company would not pay this account on the orders of the Russian Government?

Mr. Spencer: The Government objects to the witness answering this question, on the ground that he is immune, on account of his diplomatic relations.

Mr. Shay: Same objection, as previously stated.

[fol. 80] The Referee: Well, I think we have reached a point where it is necessary to pass upon the question that you have raised, Mr. Shay, as to whether the transaction itself may be examined. In your view of the situation, no question of diplomatic immunity from process is involved. The objection, as I understand it, is to an inquiry into transactions to which the Imperial Russian Government was a party, through this witness.

The Witness: And the Provisional Government.

Mr. Carson: And the Provisional Russian Government.

The Witness: Yes, I did not represent them.

The Referee: The Imperial and the Provisional Government—transactions to which the Provisional Russian Government was also a party, through this witness.

The transactions to be inquired into, at least as they were revealed by the examination of the witness yesterday, were

entirely those of a busines or proprietary character and did not appear to involve matters of a confidential nature. They appear, furthermore, to be matters which are material to the determination of this lawsuit, which is between the United States and one of its own nationals.

My attention has not been called to any statute or judicial authority which forbids inquiry into these transactions, and the objection is therefore overruled, with exceptions to the United States and to the witness himself.

[fol. 81] In view of the representation by counsel for the witness that answers to these questions may in some way prejudice the witness so far as his relations with the government he represented are concerned, I shall adjourn this proceeding to give the excepting parties opportunity to review my action in the District Court.

Mr. Shay: In order that my objection may be stated more clearly, may I say that it is really a two-fold objection; firstly, on the ground that Mr. Bakhmeteff is a former Ambassador of the Russian Government, and, secondly, on the ground that the Court is not permitted to examine into the business and affairs of the Russian Government in a proceeding of this character.

I wonder, your Honor, if I might have a sufficient amount of time so that Mr. Doing will be able to resume this matter on next Tuesday. It so happened that Mr. Doing applied to Mr. Carson for a postponement of this matter, and he will take it up. I have to leave for a time, tomorrow.

The Referee (to the stenographer): You need not take this down.

(Discussion off the record.)

(Whereupon, at 4:00 o'clock P. M. the matter was adjourned to Tuesday, May 14, 1935, at 4:45 P. M., before Judge Caffey; and for further hearing before the Referee on Thursday, May 16, 1935, at 2:30 P. M.)

[fol. 82] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

L. 59, p. 80

UNITED STATES OF AMERICA, Plaintiff,

against

GUARANTY TRUST COMPANY OF NEW YORK, Defendant

#70 Pine Street, New York City,
August 8, 1935, 2:30 P. M.

Before Harold Harper, Esq., Referee

Appearances:

Hon. F. W. H. Adams, United States Attorney, by Leon E. Spencer, Esq., Assistant United States Attorney.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., by Ralph M. Carson, Esq., of counsel, attorneys for defendant.

Coudert Brothers, Esq., by P. A. Shay, Esq., of counsel, attorneys for Boris Bakhmeteff.

[fol. 83] Mr. Carson: With your Honor's consent, we will resume the examination of Mr. Bakhmeteff and I will read the two pending questions which were unanswered on account of the objection.

The Referee: Yes. Off the record.

(Discussion off the record.)

BORIS BAKHMETEFF, having been previously duly sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. Carson (continued):

Q. "In your capacity as Ambassador, were you familiar with the existence of an account standing with the——"

Mr. Carson: Off the record.

(Discussion off the record.)

Q. "Did you know the approximate balance of that account at the end of the year 1917? Just say 'yes' or 'no'."

A. About $5,000,000 it was.

Q. "In your capacity as Ambassador did you learn that Guaranty Trust Company would not pay this account on the orders of the Russian Government?"

A. Well, I don't think the orders came from the Russian Government. That was a transaction through the Govern-
[fol. 84] ment of the United States. In other words, the Government of the United States was arranging those things for us at that time.

Q. And what did you have to do with it?

A. Well, we acted together. I don't know that I had personally called, but Mr. Ughet handled those affairs and I supervised this thing in a very general manner, and Mr. Ughet acted with the Department of State and with the Department of Treasury. The procedure in detail I don't know. I know that I approved in general the movements.

Q. Mr. Ughet, as financial attache, was stationed in New York, was he?

A. He was stationed in New York.

Q. And he came to Washington and reported to you from time to time?

A. Yes, exactly.

Q. And in that way you were kept familiar with what business he transacted; isn't that so?

A. Exactly.

Q. Did you personally, while in Washington as Ambassador, prior to your resignation in June, 1922, confer with the State Department and the Treasury Department concerning this $5,000,000 account with the Guaranty Trust Company?

A. In a general way, yes.

Q. Did you personally confer with any officers of the Guaranty Trust Company on that subject?

A. No.

Q. You left that to Mr. Ughet, did you not?

A. Yes. Mr. Ughet and Mr. Polk, I think, were handling the matter.

Q. You mean Mr. Polk at the time he was Under-Secretary of State?

[fol. 85] A. Whether he was Under-Secretary or counselor, I don't know, whatever he was in the State Department, yes.

Q. And you received your information regarding the account from Mr. Ughet and Mr. Polk, did you not?

A. Exactly. Endeavors were made. I remember the State Department was very anxious to get it, but it could not be done, and as I remember, the Government really did most of the talking. That is the general impression.

Q. Will you tell us in a little more detail, Mr. Ambassador, what was reported to you by Mr. Ughet and by Mr. Polk, or anyone else in the Government with respect to the Guaranty Trust Company's willingness to pay this account?

Mr. Spencer: If your Honor please, I would like to object to the generality of that question. I would like it more specific.

Mr. Carson: I will endeavor to fix times and places if the witness can——

The Referee: Question withdrawn then?

Mr. Carson: Question withdrawn, yes, for the time being.

Q. Can you, at this time, Mr. Ambassador, state the times and the places at which you had any conferences with either Mr. Ughet or with the State Department at which you obtained information regarding the Guaranty Trust Company's willingness to pay this account, specifying with whom you had the conferences?

A. The only thing which I remember distinctly was this: Of course, it is a long time ago.

Q. Of course.

A. We were trying to get all the money, money going to [fol. 86] the Treasury under de facto control of the Treasury, and the United States of America was just as anxious as we were to get as much money as possible. I understood completely the situation or, rather, the difficulty at that time that there was—my rather extraordinary position, and persuasion probably was the most important weapon in getting decisions from anyone.

Q. I hate to interrupt you, Mr. Ambassador.

A. Yes.

Q. I just want to draw your attention to the question. I am asking the times and places of the conferences.

A. I do not remember. This is what I remember: That there were conferences in Mr. Polk's office, where he told me that all his endeavors to get that money proved to be futile and he could not get it.

Q. Could you remember approximately what year that was?

A. Of course. That was either the very end of 1917 or early in 1918.

Q. Who was present besides you and Mr. Polk?

A. I don't believe anyone.

Q. You don't remember any officer of the Guaranty Trust Company?

A. No, sir. I am quite certain there was none present that I remember.

The Referee: Does it appear to what the word "that money" refer?

By Mr. Carson:

Q. What do you mean by the words "that money" in your statement, Mr. Bakhmeteff?

A. There was something like $5,000,000 on that account, [fol. 87] with one of the accounts of the Russian Government, the exact name of which I don't know.

By the Referee:

Q. With the Guaranty Trust Company?

A. With the Guaranty Trust Company, and we were trying to get that money to be at the disposal of the United States of America, for payment of contracts, and inasmuch as it was a large sum, of course, it was very important to get the money. I don't know the details about Mr. Polk, what they officially did, in what manner they approached the Guaranty Trust Company. I know only that they did, and the final result was that that money was not obtained; in other words, the Guaranty Trust Company refused to surrender it.

By Mr. Carson:

Q. And did Mr. Polk tell you why the Guaranty Trust Company refused to surrender it?

A. He might have, but I don't remember. I presume he simply said they did not tell why, but we were in the right in asking it that way.

Q. Did you know at the time, to your present recollection, that the Guaranty Trust Company had certain claims against the State of Russia?

A. I remember that, yes. I remember that mentioned.

Q. And do you remember that the Guaranty Trust Company on its own books, or did you know that the Guaranty Trust Company on its own books, had made an offset in payment of those claims against this Government account?

[fol. 88] Mr. Spencer: If your Honor please, I am going to object to that, whether he knows or he does not know.

The Referee: The question is that of notice to him?

Mr. Carson: Purely a question of notice.

The Referee: Perhaps the question is objectionable as to form; I mean, whether he had heard, I think would be admissible. Whether he knew or not——

Mr. Carson: I will be glad to amend it that way.

The Witness: I think it was, informed in a general manner. In a general manner I did know that was the case.

Q. In a general manner you had been informed?

A. Yes.

Q. That the——

A. I knew in a general manner. I can't say who told me, but I knew that was the case.

Q. Just this question so as to avoid misunderstanding. I understand you to say that you knew as Russian Ambassador that the Guaranty Trust Company, when payment was endeavored to be obtained of this money for the State of Russia, had made an offset on its books that held this Government account?

A. I would say what I knew was this: That the reason, or all of the reason, why they refused to give this money was the fact that they made that offset.

Q. Could you, for the benefit of both of us, try to fix how and when you obtained that information; from whom and at what time?

[fol. 89] A. That I could not remember. It was spoken of in general, but I cannot remember.

Q. Did you have more conferences than that single conference which you have described with Mr. Polk at the end of 1917 or the beginning of 1918?

A. I had many conferences, and it was constant and all the time, when he was extremely helpful, and I would not be surprised if this question was discussed many times, but I distinctly remember one conference, that I distinctly remember. The others I don't remember, but I would not be surprised if we discussed that many times.

Q. You also discussed the same subject with Mr. Ughet, I understand, when he reported to you?

A. Of course, it was a constant discussion from day to day.

Q. Do you recall the $50,000,000 bank credit which the Russian Government had obtained in the United States in 1916, payable——

A. You mean the National City Bank?

Q. Yes, payable in 1919?

A. Yes; I remember in a general way.

Q. And do you recall an interest installment falling due on that credit in July, 1919?

A. Rather, that we stopped payment of interest that time; is that what you mean?

Q. Do you recall in regard to the terms there was an interest installment due and to be paid some time in June or July, 1919?

A. I don't remember the date when it was paid. I remember we paid interest a number of times; that it was stopped, but when I don't remember.

Q. Did you have anything to do with any attempt to use the $5,000,000 account with the Guaranty Trust Company in [fol. 90] payment of that interest installment in 1919 or any part of it?

A. You mean particularly for that?

Q. Yes.

A. No. I was in Paris at that time and Mr. Ughet was charge d'affaires.

Q. So Mr. Ughet was handling the whole interest of the State of Russia in this country at that time?

A. Yes.

Q. After the change in administration, do you recall having discussed the matter of the Russian Government account with the Guaranty Trust Company with Mr. Hughes, Secretary of State?

A. I don't believe I did. As a matter of fact, I remember distinctly that that question did not come up again.

Q. Do you recall an attempt made at the end of 1921 to raise funds in the United States for Russian relief?

A. 1921, oh, yes, with Mr. Hoover. I do remember that, exactly, that question of getting money for the relief of famine in Russia, correct. I remember that, yes. I remem-

ber a conference with Mr. Hoover. I think he was Secretary of Commerce at that time.

Q. Do you have any recollection of conferring with anyone in the Department of State, either with Secretary Hughes or any other official, with regard to the raising of a famine fund?

A. No, I distinctly remember not having conferred at that time.

Q. I would like to read a passage from a letter that Mr. Hughes, Secretary of State, wrote the Guaranty Trust Company on December 2, 1921, and ask if that refreshes your recollection.

A. December 2nd?

[fol. 91] Q. December 2, 1921. "In connection with certain projects for the organization of relief for the famine sufferers of Russia, it has been reported to the Department of State that you have on your books a credit of approximately $5,000,000 in favor of the Government of Russia or of some organ of the Russian Government." I would ask if that refreshes your recollection that you or some member of your staff discussed that matter with the Department of State?

A. Mr. Ughet might have discussed that matter, but I did not. I distinctly know that I did not. As a matter of fact, I distinctly know I did not discuss any matter of relief with it.

Mr. Carson: I introduce copy of a letter dated December 9, 1921, from Mr. Sabin, as Chairman of the Board of the Guaranty Trust Company of New York, to Mr. Secretary Hughes, and ask to have it marked for identification as Exhibit No. 7.

(Copy of letter dated December 9, 1921, marked Defendant's Exhibit No. 7 for identification.)

Q. I hand you this letter, marked Defendant's Exhibit No. 7 for identification, and ask if you will be good enough to read it and state whether you ever saw the original or a copy of that letter at or about the date thereof?

A. No. I didn't know of the existence of this letter.

Q. You did not see the original or a copy in 1921 or thereafter?

A. No.

Q. You have read the Exhibit No. 7 for identification, have you?

A. You mean this letter?

[fol. 92] Q. Yes.

A. I have.

Q. Will you state whether, in 1921 or thereafter, you learned the substance of this letter in any way?

A. No.

Q. You have no recollection of the contents of this letter being communicated to you orally?

A. No; not to my memory; not to my best recollection.

Q. Now, I show you another letter from Charles H. Sabin to Mr. Polk, as Counselor of the Department of State, dated June 9, 1919, Exhibit No. 4 for identification, and ask if you will be good enough to read that?

A. That was the time when I was in Paris, at the Peace Conference. What was your question?

Q. I want to ask you whether in 1919 or thereafter you saw the original or a copy of this letter.

A. No; I don't remember seeing it. I might add that was just the time when I was in Paris. Mr. Ughet was handling matters, so it would not come to my attention.

Q. I understand you resigned as Russian Ambassador as of June 30, 1922, Mr. Bakhmeteff?

A. Yes, that is right.

Q. And thereafter you had nothing further to do with the conduct of the affairs of the State of Russia in this country?

A. None whatever.

Mr. Carson: I think that is all I have with this witness. Direct examination closed.

Gross-examination.

By Mr. Spencer:

Q. Mr. Bakhmeteff, prior to June, 1922, and subsequent to January, 1915, can you state what your Ambassador [fol. 93] status was in this country?

A. I was accredited as Ambassador, as far as I remember, on July 5, 1917, and my position remained unimpaired, as there is no other status except as the status of Ambassador, until June 30, 1922. In other words, there was no official change in my status so far as the United States Government was concerned. They recognized me; they continued to recognize me as Ambassador and that is all.

Q. Did you at any time during this period ever have any communications with the Soviet Government or the Union of Soviet Socialist Republics?

A. None whatever.

By the Referee:

Q. You mean they never wrote you at all?

A. Oh, yes, they did write me. This is off the record.

(Discussion off the record.)

The Witness: There was a circular telegram that was sent to all Ambassadors.

By Mr. Spencer:

Q. You have referred to having received a communication?

A. It was one that was sent to all the charge d'affaires inviting them to accept allegiance to the Soviet Government and, like I would say the great majority of the diplomatic representatives, the telegram was ignored.

Q. Can you state at about what time that telegram was received?

A. I would say in November, 1917.

[fol. 94] Q. And with that one exception you received no further communication from the Soviet Government?

A. No.

Q. Did you at any time discuss any affairs of the Soviet Government with the State Department?

A. Affairs of the Soviet Government?

Q. Yes.

A. What do you mean by "affairs of the Soviet Government," of the general conditions or what?

Q. Any——

A. My status or my attitude towards them?

Q. That is right.

A. Oh, yes; I presume that I wrote Secretary Lansing about that. My position was very clear.

Q. What was that position?

Mr. Carson: I object to that question. I don't think the witness can characterize his position.

The Referee: Well, this is the contents of a communication that he sent?

Mr. Spencer: So I understand.

Mr. Carson: Then I object to that as not the best evidence. I didn't so understand.

The Referee: It must be sustained on the ground that it is not the best evidence.

Mr. Spencer: If your Honor please, I take an exception to that because of the unusual circumstances. I don't believe the rule applies.

The Referee: Well, my ruling is simply that the witness is being asked to state the contents of a document.

Mr. Spencer: Which he himself——

[fol. 95] The Referee: I assume the document is in the State Department and, therefore, can be produced by the Government, if it is material or important.

Mr. Spencer: If your Honor please, I would like the record to state that an examination has been made for any such letter as this without knowing the date of any such letter, and it could not be found. I would like the notation to be made on the record or is the record to be held open in some manner so that the non-existence of the letter may be established? I don't know the date of it.

The Referee: What do you say as to that, Mr. Carson? Are you willing to accept Mr. Spencer's statement as to the fact of the search?

Mr. Spencer: Off the record.

(Discussion off the record.)

Mr. Carson: I would like to suspend an answer to that question pending a further inquiry into the matter.

The Referee: Then the ruling will stand.

By Mr. Spencer:

Q. Mr. Bakhmeteff, on your direct testimony you have stated that "we were" very anxious to obtain all the money possible from the Guaranty Trust Company and other sources. To whom did you refer by "we"?

A. I meant the United States Government and the Russian Embassy, which were cooperating, in what we believed at that time to be the best American interests.

[fol. 96] Can you state the situation surrounding your resignation as Russian Ambassador?

Mr. Carson: I object to that as immaterial.

The Referee: Overruled.

The Witness: It is a very long story.

Mr. Carson: Exception.

The Witness: It is all in the record in the State Department, I presume, all the circumstances.

Mr. Carson: You mean it is comprised in written communications?

The Witness: Communications, memoranda, yes. There was published, as a matter of fact, in the papers a letter which I wrote Secretary Hughes and his answer.

Mr. Carson: Objected to as calling for material not the best evidence.

The Referee: Well, the question is somewhat general and its materiality is not apparent to the Referee.

Mr. Spencer: Of course, I can only accept the answer. I am not sure whether he is going to give an answer.

The Referee: What do you hope or expect to prove by it?

Mr. Spencer: That the resignation of Mr. Bakhmeteff was occasioned by the fact that he had long continued to represent a hypothetical State and that his continuation as an official would not be warranted.

The Referee: I cannot see that anything is material there except the actual status and the date of the termination of the status.

[fol. 97] Mr. Spencer: My only doubt is whether we have got a statement of his actual status. That has given me some concern.

Mr. Carson: I would like to put on the record in support of my objection to the immateriality of this type of question, so it will not be necessary to say that the status was hypothetical and to state to your Honor that Mr. Bakhmeteff's status of Russian Ambassador was affirmed in these United States to be equal to the State of Russia in documents emanating from the State Department up to 1931.

The Referee: Now, we have counsel testifying, but it seems to me it was up to the State Department either to continue to receive him as Ambassador or to refuse to do so. So long as they continued to receive him as Ambassador it would seem to me that he had full ambassadorial status. At least, the Court would be bound by the action of the political department in that respect.

Mr. Carson: It has been so held by the Federal Courts of this Circuit.

Mr. Spencer: I would not want to acquiesce in that conclusion. I don't think I have any further questions.

Redirect examination.

By Mr. Carson:

Q. Mr. Bakhmeteff, you are the same Mr. Bakhmeteff as Russian Ambassador who was a plaintiff in a suit entitled State of Russia against the Lehigh Valley Railroad Company, are you not?

A. Yes.

[fol. 98] Q. And which was commenced about the year 1918, was it?

A. As far as I remember.

Mr. Carson: That is all.

The Referee: That is all today, gentlemen?

Mr. Carson: That is all with this witness, Mr. Referee. I wanted some time to offer, or to re-submit to your Honor most of the exhibits marked for identification. I don't like to do that now. It might wait until the deposition is closed.

The Referee: Yes.

Mr. Shay: Is the deposition open with reference to Mr. Bakhmeteff now?

Mr. Carson: It is closed, I understand.

Mr. Shay: There was some discussion before about leaving it open.

Mr. Carson: Oh, Mr. Spencer wanted—off the record.

(Discussion off the record.)

The Referee: By agreement of counsel for the United States and the Guaranty Trust Company, Mr. Bakhmeteff's recollection of the contents of his communication to the State Department previously inquired into will be placed upon the record subject to a motion to strike in the event that it shall not be shown that secondary evidence is admissible.

Recross examination.

By Mr. Spencer:

Q. What is your recollection, Mr. Bakhmeteff, of the contents of the memorandum which you handed to Mr. Polk?

A. It was not to Mr. Polk.

[fol. 99] The Referee: Answer as well as you can.

The Witness: The object or the purpose, or the purposes, of that communication was to make clear the attitude which I took towards the Soviet Government. My attitude at that time was that we had not recognized, I had not recognized, the Soviet Government as a government which lawfully represented Russia, and in view of that I refused to have any communications with it or consider it as having any authority in so far as I am concerned. That is about all. Is that clear?

Mr. Carson: That is all in your answer.

The Referee: Have you got the date of this communication now?

Mr. Carson: Can you remember the approximate date of it?

The Witness: Yes, I said I presume it was in November, 1917.

Mr. Carson: And I understand that was your only communication on the subject to the United States Government; is that correct?

The Referee: Written communication.

Mr. Carson: Yes, written communication.

The Witness: There might have been informal communications of different character, but I remember this as being a communication of basic character, I would say, which clearly defined my attitude and my position. I presume that the State Department knew about that attitude, anyhow, before.

[fol. 100] By Mr. Spencer:

Q. Your attitude never changed?

A. No. I could not have remained as Ambassador if I had.

Mr. Spencer: That is all.

Mr. Carson: That is all. I think it will be unnecessary for Mr. Bakhmeteff to come back.

The Witness: I will be very glad to come back if necessary.

Mr. Carson: Unless the Referee would like you to come back to sign.

(Discussion off the record.)

(Whereupon, at 3:30 o'clock P. M. an adjournment was taken to September 17, 1935, at 2:30 o'clock P. M., at the same place.)

[fol. 101] DEPOSITION OF BORIS BAKHMETEFF

BORIS BAKHMETEFF, resumed the stand and testified further as follows:

Redirect examination.

By Mr. Carson:

Q. Mr. Ambassador, at page 86 of the record, at the foot of the page, appears the question of the Referee: "You mean they"—meaning the Soviet Government—"never wrote you at all?" And your answer appears: "Oh, yes, they did write me. This is off the record." Is that a correct statement of the answer which you desired to make?

A. It does not convey the idea which I wanted to convey. I think the idea is correctly stated on the next page. The only communication which was made was when they sent me their circular telegram and I never answered it.

The Referee: It is fairly clear on the record as it is now.

Mr. Carson: I think it is. The witness called my attention to it and wished to put it beyond all doubt.

Q. Mr. Ambassador, in your previous testimony in answer to the Referee's question at page 79 you said that, "We were trying to get that money to be at the disposal of the United States of America for payment of contracts." Would you describe what contracts you meant in that answer?

A. During the war extensive contracts were entered into by the Russian Government with different American com-
[fol. 102] panies. I do not remember the exact figure, but they amounted to many hundreds of millions of dollars. At the time when the Government which I represented fell, those contracts were still in force and it seemed to be important to us, from the point of view of Russian interests, and it seemed to me, as I understand, that it was important from the American point of view for the American Government, to have as little trouble on those contracts as possible, and the endeavor was, officially on our part, to liquidate those contracts with as little trouble and as little litigation as possible.

That endeavor, as I sincerely believe, was backed very strongly by the American Government, and the American

Government assisted us in every way to do so; in other words, we got the cooperation of the institutions of the United States which dealt with purchases of war, and the money which was to be used for that was the money which was still on the balances of the Russian Government, at the time when the provisional government fell, that was the money which we wanted to get for that purpose principally.

Q. And that money so on the balances of the Russian Government included the $5,000,000 account with the Guaranty Trust Company?

A. In our mind it included all the monies that we could get.

Q. In referring to "we" and "us" in your answer, a minute or two ago, you mean the Russian Embassy?

A. I meant the Russian Embassy as a collective institution which has many branches. The Russian Embassy as a diplomatic institution did not handle the details, but it was [fol. 103] part of the Russian organization which was headed by the Russian Embassy.

Q. And they took place under your supervision?

A. Under my general supervision and direction.

Q. In your previous testimony you spoke of Mr. Polk's and the State Department's statements to you with reference to the reply of the Guaranty Trust Company as to payment upon the $5,000,000 Russian Government account. You also spoke of approaches made to the Guaranty Trust Company by the State Department. Will you state now in case there be any ambiguity, whether the actions of the State Department or of the Treasury Department, if any, with reference to the Guaranty Trust Company's payment of this account were made with your knowledge and approval as Russian Ambassador?

A. I would say in general that any actions of members of the American Government were those of a friendly go-between. They tried to help us to get that money. Naturally, we were the principal in the case and, naturally, all transactions were made on behalf of the Russian Embassy. I could not state in detail what came first in any detailed transaction.

Q. You cannot recall any particular negotiation?

A. No, but in general I would say that, of course, everything that was done was done on behalf of the Russian Embassy and the members of the American Government, the State Department, the Treasury Department and others

were assisting the policy of the Russian Embassy which they endorsed.

Q. And which you personally supervised and endorsed?

A. In a general way, yes.

[fol. 104] Q. Did you know a Mr. D. Ter-Assatouroff as an official of the Russian Embassy?

A. I remember that a person by that name was on Mr. Ughet's staff. Whether he was on the diplomatic list or not I do not recall.

Q. Do you recall at this time any conferences with or reports from him on the subject of the $5,000,000 account with the Guaranty Trust Company?

A. No, I do not remember that.

Mr. Carson: I have no more questions of this witness.

Recross-examination.

By Mr. Spencer:

Q. Mr. Bakhmeteff, in your previous testimony and just now on redirect you have spoken with reference to an effort which was made at one time apparently to get that money, and as you state in your testimony, "We were trying to get that money." Does that refer to any act on your part, and if so, what act?

Mr. Carson: What page is that?

Mr. Spencer: 79.

A. It does not refer to any specific act of mine. As I explained, the details of the executive part in finance was not in my hands, but it was in the hands of Mr. Ughet. So far as I was concerned I was interested in getting as much money as possible, and whenever it was necessary to give any endorsements or help any of the staff to do anything, I did it, or in many cases, I took up matters with the [fol. 105] State Department. My activities were limited to that.

Q. And the use of the word "we" here does not refer to any joint attempt on your part and on the part of someone else?

A. I speak of "we" as collectively for the Russian institutions of which I was the head and had the full power and so naturally everything was done in my name, although not by my hands.

Q. You can state pretty definitely though that you yourself never did negotiate any effort to obtain from the Guaranty Trust Company that fund?

A. I can state that positively. I have not seen any officials of the Guaranty Trust Company and except a conversation with Mr. Polk and probably with Mr. Ughet, I do not believe I ever conversed on that matter with anyone else.

Mr. Spencer: That is all.

The Referee: That concludes the examination of this witness?

Mr. Carson: Yes, sir.

B. Bakhmeteff.

Sworn to before me this 19th day of September, 1935.
Matthew V. Stepsis, Notary Public, Kings County.
Kings Co. Clerk's No. 829, Register's No. 7195.
N. Y. Co. Clerk's No. 341, Register's No. 7S210.
Commission Expires March 30, 1937. (Seal.)

[fol. 106] Mr. Carson: I would like at this time, on the basis of all the testimony, to offer formally in evidence, in case such an offer might subsequently be deemed necessary as part of these depositions, Defendant's Exhibits 1, 2, and 3 for Identification, which have already been offered and, as I recall at the time, excluded by your Honor.

(Discussion off the record.)

Mr. Spencer: The Government objects to the receipt of these exhibits for identification in evidence on the ground it has not been shown that these letters were actually sent by the parties sending them, and on the ground that they are incompetent, irrelevant and immaterial.

The Referee: The objection is sustained. At the present time there is no proof that Defendant's Exhibit 3 for Identification emanated from the Guaranty Trust Company, and until that is shown, there is no basis for the introduction either of that exhibit or of Exhibits 1 and 2 for Identification, which it may render competent when properly authenticated.

This hearing, of course, is merely for the purpose of taking the testimony of two witnesses, and their testimony has not been sufficient to authorize the receipt of these letters, Exhibits 1, 2, and 3.

It is possible that other evidence may be offered by affidavit which will render these exhibits competent, and this ruling is, of course, made without prejudice to the Court [fol. 107] receiving letters in evidence upon the hearing of the motion, if it deems them competent upon the evidence then before it.

Mr. Carson: May I respectfully except? In view of your Honor's ruling I will make no further offer of exhibits for identification in evidence at this time.

(Whereupon, at 3:35 o'clock P. M. the hearing in the above-entitled matter was closed.)

[fol. 108] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DIMITRY G. TER-ASSATOUROFF

DOMINION OF CANADA,
Province of Quebec,
City and District of Montreal, ss:

Dimitry G. Ter-Assatouroff, being duly sworn, says:

I was born in the former Empire of Russia, now part of the territory of the Soviet Union, and am Russian by nationality. I now reside permanently at No. 1423 St. Matthew Street, City and District of Montreal, Dominion of Canada.

1. From 1909 to December 1922 I occupied various official positions in the Credit Chancery and other departments of the Ministry of Finance of the Imperial Russian Government and (after the February 1917 Revolution) the Provisional Russian Government, being sent abroad at various times during such period on official missions for the Ministry of Finance. In this capacity I became thoroughly familiar with the administrative structure of the Ministry [fol. 109] of Finance and with its various officials. The so-called Section Etrangere of the Ministry of Finance was a department of the Credit Chancery of the Ministry of Finance designated as the Foreign Section because it handled the foreign financial transactions of the Credit Chancery which, in turn, was the banking department of the Minis-

try. Thus the Section Etrangere was an agency or subdivision of the Russian Government. The administrative head of the Credit Chancery, under whose jurisdiction was the Section Etrangere and who supervised all its payments abroad for account of the Ministry of Finance, was during 1917 and until the Soviet Revolution of November 7, 1917, Conrad de Sahmen, personally known to me in Petrograd. In the Soviet Revolution Mr. de Sahmen lost his position, and I subsequently met him in London as an exile. I understand he now resides in Paris.

2. By order signed on January 4, 1917, Russian style (January 17, 1917, modern style), by Peter Bark, as Minister of Finance of the Imperial Russian Government, I was designated as Assistant Representative of the Ministry of Finance with the Russian Supply Commission in New York. On April 12, 1917, modern style, I arrived in New York and took up my duties as such Assistant Representative, in which duties I was the immediate subordinate of Mr. Serge Ughet, who then had the title of Representative of the Ministry of Finance with the Russian Supply Commission in New York. Shortly after my arrival and before November 7, 1917, Mr. Ughet was designated by the Minis- [fol. 110] try of Finance to serve as Financial Attache of the Russian Embassy in the United States under Mr. Boris Bakhmeteff, Russian Ambassador to the United States. Nevertheless my duties continued to be those of an assistant to Mr. Ughet in the management and supervision of the financial business of the Russian Government in the United States. Shortly after the Bolshevik Revolution of November 7, 1917, I was designated by the Russian Ambassador and by Mr. Ughet as Assistant Financial Attache of the Russian Embassy in the United States. My offices as such Assistant Financial Attache were until about the end of 1919 in the Flatiron Building in New York City.

3. In my capacity as Assistant Representative of the Ministry of Finance with the Russian Supply Commission in New York, I learned from Mr. Ughet and from the records of the said Financial Department that the Russian Government had an account with Guaranty Trust Company of New York, carried under the name Section Etrangere Ministere des Finances, and in the latter half of 1917 I had conversations and correspondence on the general subject of entries in this account with one Mr. Putnam, Treasurer of

Guaranty Trust Company. From the correspondence which passed through the Financial Department I learned that about July 1917 Mr. Ughet as Financial Attache made a payment of $5,000,000 to the credit of this account. Toward the end of 1917 it was my understanding that the credit balance in this account was about $5,000,000.

[fol. 111] 4. After the Soviet Revolution of November 7, 1917, it became the policy of the Russian Embassy in the United States, as I learned in the course of my duties from conversations with Mr. Ughet and the Russian Ambassador and with various New York bankers and from the records of the Financial Department, to have placed at the disposal of the Embassy all Russian Government moneys in the United States, under whatsoever title such moneys might be held by the depositary banks, in order to draw upon the same for payments in the United States upon Russian Government loans, supply contracts, and other obligations of the Russian Government. These loans, contracts and obligations aggregated in amount vastly more than the total of moneys at the disposal of the Russian Embassy.

In pursuance of this policy (as I also learned in the course of my duties aforesaid) Mr. Ughet arranged for the transfer of practically all Russian Government moneys with National City Bank of New York to the account of Mr. Bakhmeteff, as Russian Ambassador, in the manner set forth in the letter dated November 28, 1917, of which a copy is attached hereto marked Exhibit 5 for identification. I was familiar with this form of letter at the time. Mr. Ughet informed me that he would make a similar request of Guaranty Trust Company of New York with reference to the Section Etrangere Ministere des Finances account. Subsequently, under date of December 12, 1917, the Financial Department received a letter of refusal addressed to Mr. Ughet over the signature of Charles H. Sabin, as President of Guaranty Trust Company, of which letter a copy is attached hereto marked Exhibit 6 for identification.

On at least one occasion thereafter during 1918 I accompanied Mr. Ughet to the offices of Guaranty Trust Com-
[fol. 112] pany of New York and met a man whom he introduced to me as Mr. Sabin and whom I understood to be President of Guaranty Trust Company. I cannot fix the exact date of this conversation, nor can I recall the exact words used. The substance of what Mr. Ughet said was

that he requested Guaranty Trust Company to place at the disposal of the Russian Embassy in the United States the Section Etrangere Ministere des Finances account, and that the Russian Ambassador was at that time legally the Russian Government to which the account belonged. Mr. Sabin said in substance that Guaranty Trust Company would not comply with this request. On two or three occasions during 1918 and 1919 I accompanied Mr. Ughet to the office of Mr. Albert Breton, then Vice-President in Charge of the Foreign Department of Guaranty Trust Company. On each of these occasions substantially the same conversation was held with respect to the Section Etrangere Ministere des Finances account as I have above described in connection with Mr. Sabin. I am unable to recall the exact words used in the conversations with Mr. Breton or to fix the exact dates thereof, except that they all took place before the last installment of interest due July 10, 1919, on a $50,000,000 loan made by Guaranty Trust Company and other New York Banks to the Russian Government. This loan had been arranged in June 1916 while I was with the Ministry of Finance in Petrograd.

At the time of the conversations just referred to I do not recall having known exactly what claims Guaranty Trust Company had against the Russian Government except that I did know that Guaranty Trust Company as member of [fol. 113] a syndicate of banks had a claim for 150,000,000 rubles against the Russian Government which were to serve as collateral for a loan, and I also assumed that Guaranty Trust Company with other New York banks had had ruble deposits in Russia at the time of the Soviet Revolution. My understanding at the time of the said conversations with Mr. Sabin and Mr. Breton was that Guaranty Trust Company did have claims of some kind against the Russian Government arising out of the Soviet Revolution and that it insisted upon retaining the Section Etrangere Ministere des Finances account to satisfy these claims. I cannot now recall or identify the source from which I received this understanding.

5. At the beginning of 1922 I learned in some fashion (which I cannot now recall or identify) that Guaranty Trust Company had been requested to make the Section Etrangere Ministere des Finances account available to the Russian Embassy for purposes of Russian Relief, and that Guar-

anty Trust Company had refused to do so by reason of its claims against Russia.

6. I resigned my position as Assistant Financial Attache in December 1922.

Dimitry Ter-Assatouroff.

Sworn to before me at the City of Montreal in the Province of Quebec this 7th day of October, 1935. J. Mulcair, Notary Public. (Seal No. 319, Dominion of Canada, Province of Quebec, District of Montreal.)

[fol. 114] IN THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC

To All Whom These Presents May Concern:

I, the undersigned, J. A. Valiquette, Deputy Prothonotary, in the District of Montreal, of the Superior Court for the Province of Quebec in the Dominion of Canada, the same being a Court of Record.

Do Hereby Certify, that John Mulcair whose name is subscribed to the certificate of the proof or acknowledgement of the annexed instrument and thereon written, was, at the time of taking such proof and acknowledgement, a Notary Public, in and for said District of Montreal, residing therein, duly commissioned and sworn, and authorized by the laws of said Province to administer oaths, to take the acknowledgements and proofs of deeds or conveyances, for land, tenements or hereditements in said Province, to be recorded therein. And further that I am well acquainted with the handwriting of said John Mulcair, Notary Public, and verily believe that the signature to said certificate of proof or acknowledgement is genuine.

Given under my hand and the seal of the said Superior Court at the City of Montreal, in the said Province of Quebec, this seventh day of October in the year of Our Lord one thousand nine hundred and thirty-five.

J. A. Valiquette, Deputy Prothonotary of the said Superior Court.

[Revenue Stamp.]

[fol. 115] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF NICHOLAS S. KARINSKY

STATE OF NEW YORK,
County of New York, ss:

Nicholas S. Karinsky, being duly sworn, says:

1. I was born in Russia and was a Russian subject until 1930 when I became a citizen of the United States. Until 1920 I resided in Russia. I am a graduate of the Law School of the Imperial University of Moscow and a lawyer by profession. I was admitted to the Bar in Russia in 1897 from which time until the early part of 1917 I was a practicing attorney with an office in Moscow. I practiced law before all the courts of the Empire, including the Ruling Senate, which was the highest court of the Empire.

In 1917, after the establishment in Russia of the Provisional Government known first as the Government of Prince [fol. 116] Lvov and subsequently as the Kerensky Government, I was appointed Attorney-General of the Court of Appeals of the St. Petersburg Judicial District. I occupied this post from May 1917 to August 1917, when I was appointed by the Provisional Government as the Presiding Justice of the Court of Appeals of the St. Petersburg Judicial District. I resigned late in September 1917, when I resumed my law practice. Later, in 1920, I was appointed Minister of the Interior in the Government of General Denikin.

2. On or about October 15, 1917, I came from Moscow to Petrograd on personal business and stayed in Petrograd until about the middle of November, 1917. During that time I was in constant touch with the members of the Provisional Government, who on many occasions consulted with me and sought my advice on various Government matters. More particularly I was in constant communication with the Minister of Justice Maliantovich, the Minister of Finance Bernadsky, and with the then President of the Provisional Government Alexander Kerensky.

I was in Petrograd on October 25, 1917, when the Bolshevik uprising took place which overthrew the Provisional Government and replaced it with the Soviet Government. On that date all the Ministers of the Provisional Government

were arrested by the revolutionary forces, who thereupon formed the first Soviet Government. I was in touch with the said Ministers just a few hours before their arrest.

As soon as the Ministers were arrested, the Assistant Ministers convened in a meeting called by Assistant Minister [fol. 117] of Justice Demianoff, at which I was present, being called as a consultant. This meeting was held in the private apartment of the Assistant Minister of Finance, since his office was already taken by force of arms by the revolutionary government. The Assistant Ministers decided immediately to form a new government to oppose the revolutionary forces which then were taking control of the city. The proposed new government, however, was never formed, because all the Assistant Ministers were on that day either arrested or forced to flee from Petrograd.

From personal observation and from first hand information which I received at that time I know that all the various Government departments, such as the office of the President, the offices of the Minister of Justice, the offices of the Minister of Foreign Affairs, the offices of the Minister of the Interior, the offices of the Minister of Finance, were seized by the Bolshevik revolutionists and were closed; that none of the senior officials returned to their former posts; that all Government institutions were seized by the revolutionary Soviet Government and the whole administrative, executive and legislative machinery of the Provisional Government ceased to function, being replaced within a few days by the newly created organs of the Soviet Government under decrees of the All-Union Congress of the Soviets then sitting in Petrograd.

3. The office and employment of the Ministers of the Provisional Government thus ceased on or about October 25, 1917. There was no succession of personnel as between the Provisional Government and the Soviet Government estab- [fol. 118] lished on or about October 25, 1917. From the point of view of the law of the Provisional Government, of course, there was no succession of power and jurisdiction from the Provisional Government to the Soviet Government, but on the contrary the line of succession from the Provisional Government followed the personnel of the Provisional Government, who fled to the east of Russia and constituted opposition governments under the leadership first of Admiral Kolchak and then of General Denikin. From

the point of view of Soviet law also, there was no succession between the Provisional Government and the Soviet Government, in that the Soviet leaders considered the Soviet Government to be a revolutionary government whose function it was to overthrow and destroy not only its predecessor government but all the institutions of property and society which had grown up thereunder. Hence the Government departments and the Ministries which had existed under the Provisional Government were liquidated and terminated by the Soviet Government, in law as well as in fact, instead of being taken over by the Soviet Government. The executive organ of the Soviet Government established by decree of the All-Union Congress of Soviets on or about October 26, 1917, was the Council of People's Commissars.

I have examined the Constitution of the R. S. F. S. R. which provides for the establishment of a Commissariat of Finance and the decrees of July 10, 1918, and November 12, 1923, promulgated by the R. S. F. S. R. and the Union of Soviet Socialist Republics respectively, which set forth in detail the functions of the Soviet Commissariat of Finance. [fol. 119] Nowhere did I find any reference to the former Ministry of Finance of the Russian Imperial or Provisional Governments. I have likewise examined a statement in a Russian Work entitled "Abbreviated Soviet Encyclopedia" and appearing from the title page thereof to have been published at Moscow by a Soviet Government agency in 1930, which statement appears at page 556 under the word "Narkomfin" (People's Commissariat of Finance). This statement in part reads as follows:

"The People's Commissariat of Finance was established by Decree of October 28, 1917, in place of the liquidated Ministry of Finance."

4. All dates mentioned in this affidavit are given according to the Russion old style, which was in effect in Russia at the time of the events described and which is thirteen days behind the American calendar.

Nicholas S. Karinsky.

Sworn to before me this 7th day of October 1935.
Wm. H. Bruder, Notary Public, Bronx County No. 122.

[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAROLD STANLEY

STATE OF NEW YORK,
County of New York, ss:

Harold Stanley, being duly sworn, says:

I am President of Morgan Stanley & Co. Inc., a New York corporation with its office and place of business at No. 2 Wall Street, New York, N. Y. In 1918 and 1919 I was a Vice-President of Guaranty Trust Company of New York.

1. During 1918 and 1919 as such Vice-President I was familiar in a general way with the dollar accounts formerly kept by Russian banks and by the Russian Government with Guaranty Trust Company and with the ruble accounts of Guaranty Trust Company in various Russian banks. The title of the said Russian Government dollar account on the books of Guaranty Trust Company was Section Etrangere [fol. 121] Ministere des Finances. I was also familiar with the fact that in February 1918 Guaranty Trust Company closed all the said dollar accounts on its books and in the form of a set-off applied the credit balances therein against the dollar equivalent of the ruble balances owed it by various Russian banks, on the ground that these banks had been taken over by the Soviet Government. In the course of my duties during 1918 and 1919 I had numerous conferences on the subject of the said Russian accounts with Mr. Charles H. Sabin, then President of Guaranty Trust Company of New York, now deceased.

In 1918 and 1919 I was acquainted with Mr. Serge Ughet, Financial Attache of the Russian Embassy in the United States. Mr. Sabin informed me at some time (which I have no means of fixing exactly) between the Soviet Revolution of 1917 and the meeting hereinafter described that in conversations with the said Ughet he had on behalf of Guaranty Trust Company of New York refused to pay to the Russian Government the said account entitled Section Etrangere Ministere des Finances.

2. On June 18, 1919, a large loan made by a group of New York banks to the Russian Government matured and be-

came payable. This group of banks included Guaranty Trust Company of New York, and The National City Bank of New York had acted as manager of the group with respect to the loan. Shortly before the loan was to mature I on behalf of Guaranty Trust Company attended a conference of representatives of this group of banks at the office of John H. Fulton, then a Vice-President of National City Bank. The said Mr. Ughet also attended this confer- [fol. 122] ence. There took place a general discussion as to whether there were any means of preventing a default on the said loan and of paying interest thereon. Mr. Ughet requested Guaranty Trust Company to make certain Russian Government funds which it held available in this emergency, by which expression I understood him to refer to the Section Etrangere Ministere des Finances account above mentioned. I objected to this statement and said in substance that Mr. Ughet had no right to make it, because he had known for some time that this money was not available unless the Russian Government paid Guaranty Trust Company what it owed to them.

Harold Stanley.

Sworn to before me this 18th day of October, 1935.
Matthew V. Stepsis, Notary Public, Kings County.

[fol. 123] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CHARLES SARGENT

STATE OF NEW YORK,
County of New York, ss:

Charles Sargent, being duly sworn, says:

I am a member of the firm of G. M.-P. Murphy & Co., investment bankers having their office and place of business at No. 52 Broadway, New York, N. Y., and in the year 1919 was a member of the firm of Kidder Peabody & Co., investment bankers having their office and place of business at New York, N. Y.

Kidder Peabody & Co. were a member of the group of New York banks who in June 1916 extended a credit of

$50,000,000 to the Imperial Russian Government. This credit matured and became payable in June 1919.

I have read the affidavit of Harold Stanley herein verified October 18, 1935, and recall having been present at the meeting of representatives of a New York banking group in [fol. 124] June 1919 to which Mr. Stanley refers in the said affidavit. To the best of my recollection Serge Ughet or John H. Fulton, Vice-President of National City Bank, said at such meeting that the Russian Government money with Guaranty Trust Company should be used to pay the interest on the Russian Government loan which would soon fall due. This loan was in the amount of $50,000,000, and the interest payable on July 10, 1919, was $1,625,000. I recall that Mr. Stanley said in positive tones that Guaranty Trust Company would not make this money available. To the best of my recollection he said in substance that Guaranty Trust Company had a set-off against this money, but I do not recall the details of what he said on that subject.

Charles Sargent.

Sworn to before me this 18th day of October, 1935.
Matthew V. Stepsis, Notary Public, Kings County.

[fol. 125] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF STUART H. PATTERSON

STATE OF NEW YORK,
County of New York, ss:

Stuart H. Patterson, being duly sworn, says:

I am and have been since December 3, 1917, Comptroller and since April 15, 1929, Vice-President of Guaranty Trust Company of New York, and in such capacity have and have had general supervision of all its accounts, including among others the accounts in dollars which the Russian Government and various Russian banks maintained with Guaranty Trust Company in December 1917 and the accounts in rubles which Guaranty Trust Company maintained in December 1917 with various Russian banks in Russia.

1. Among the said Russian accounts so under my general supervision was an account in dollars on the books of [fol. 126] Guaranty Trust Company of New York entitled "Section Etrangere Ministere Des Finances," or Foreign Section Ministry of Finance, which I understood to be an agency or subdivision of the Russian Government. In December 1917, according to the books of Guaranty Trust Company, there stood to the credit of this account the sum of $4,976,722.78. This amount, as is shown by the said books and by the attached Exhibits 8 and 9, was the balance remaining from a payment made to the credit of the said account by Mr. Serge Ughet, Financial Attache of the Russian Embassy in the United States, by a check in the amount of $5,000,000 on July 13, 1917. The previously existing balance in the Section Etrangere Ministere des Finances account had been exhausted and an overdraft created on July 2, 1917, according to the books of Guaranty Trust Company of New York, by the transfer on that date of $5,000,000 out of said account to the special account of Russo-Asiatic Bank by cable order of the Ministry of Finance. Mr. Ughet's said check of $5,000,000 was enclosed in a letter from Mr. Ughet to Guaranty Trust Company dated July 12, 1917, of which a copy is hereto attached marked Exhibit 8. Inasmuch as Mr. Ughet's statement that this payment would leave a balance of only $3,784,510.22 did not accord with our records, Guaranty Trust Company replied to Mr. Ughet under date of July 13, 1917, with a letter of which a copy is attached marked Exhibit 9. This letter was signed by Mr. N. D. Putnam, now deceased, who was then Treasurer of Guaranty Trust Company.

Mr. Ughet's payment above described left a credit bal- [fol. 127] ance of $5,040,454.31 in the account Section Etrangere Ministere des Finances on July 13, 1917, and few payments were thereafter made out of the account up to the date of the Soviet Revolution of November 7, 1917. It is my understanding that after such date Guaranty Trust Company refused to permit withdrawals from the account. The following notation appears on the face of the account under date of November 10, 1917:

"Notice: Allow no withdrawals. Refer to Mr. Conway or see Mr. Putnam."

2. After the Soviet Revolution, Guaranty Trust Company of New York ascertained by newspaper reports and in other

ways that the Soviet Government had taken over the various Russian banks with which Guaranty Trust Company had accounts and had repudiated the public debt. On February 15, 1918, Guaranty Trust Company cabled to its representative in Petrograd, Harvey C. Emery, to ascertain the facts in this regard, and on February 23, 1918, received cablegrams from Mr. Emery stating that all Russian commercial banks had ceased to exist, having been absorbed into the State Bank; that the shares of the Russian commercial banks had been declared null and void; that a decree nationalizing the said banks had been enacted by the Soviet Government on December 27, 1917, a decree repudiating the loans of the Russian Government on February 3, 1918, and a decree annulling the share capital of said banks on February 3, 1918; and that there was no hope of payment of the accounts of Guaranty Trust Company of New York with the various Russian banks.

[fol. 128] On the basis of this and other information, Guaranty Trust Company determined, and was advised by counsel, that the Russian Government which had de facto succeeded to the Provisional Russian Government had taken over all the Russian commercial banks; that these banks had been absorbed by it into the State Bank; and that the Russian Government through the State Bank had succeeded to the assets and liabilities of the commercial banks, including liabilities upon the credit balances of Guaranty Trust Company in such banks. The counsel of Guaranty Trust Company, with whom I personally consulted and conferred in this connection, was Mr. Charles H. Russell, now deceased, a partner in the firm of Stetson Jennings & Russell (now Davis Polk Wardwell Gardiner & Reed).

3. In consequence of this situation and upon the advice of Mr. Russell, the Russian accounts of Guaranty Trust Company under my supervision were on or about February 25, 1918, consolidated into a single account entitled "Russian Government account" to the end and for the purpose of availing of the Section Etrangere Ministere des Finances account to pay Guaranty Trust Company's claim against the Russian Government for the dollar value of its ruble balances with the former Russian private banks. As part of this transaction the above-described account Section Etrangere Ministere des Finances was closed by entering

on the debit side thereof on February 25, 1918, the exact balance appearing on the credit side and by entering a cipher under the caption "balance." These closing entries in the account as made under my supervision and as still [fol. 129] standing on the books of Guaranty Trust Company are the following:

"Date	Debits	Credits	Balance
1918		.....	5,001,849.79
Feb. 25	5,001,849.79		0"

The said Russian Government account, created on February 25, 1918, under my direction and supervision as a consolidation of the above-described Russian accounts, comprised on the credit side all the dollar balances formerly standing with Guaranty Trust Company to the credit of the account Section Etrangere Ministere des Finances and the various Russian commercial banks, and on the debit side the ruble balances owed to Guaranty Trust Company by its various Russian banking correspondents together with the dollar valuations at which these balances appeared on the books of Guaranty Trust Company. The total amount owed by the Russian Government to Guaranty Trust Company according to said Russian Government account as of February 25, 1918, was more than $9,000,000, while the total owed by Guaranty Trust Company to the Russian Government according to said account as of such date was $7,226,000 approximately. Subsequently additions were made to said Russian Government account on both sides of the ledger without substantially affecting the balance of the account, which continued to be in favor of Guaranty Trust Company and against the Russian Government.

4. On March 14, 1918, the closing of the account Section Etrangere Ministere des Finances and the creation of the [fol. 130] consolidated account above-described were approved by the Executive Committee of the Board of Directors of Guaranty Trust Company. At the meeting of said Committee on that date, the following proceedings were had according to the minutes:

"The President having made a report to the Committee in regard to financial conditions in Russia, the reported absorption of the commercial banks by the government, the discontinuance of the existence of such banks and the con-

fiscation of their share capitals, and the repudiation of government loans, and that the officers of the Trust Company, in view of existing conditions and under advice of counsel, had consolidated the accounts of the Russian commercial banks in Russia and of the Russian government into one account under the title 'Russian Government Account,' it was on motion, duly seconded,

Resolved that the action of the officers of the Company in consolidating the accounts of the Russian commercial banks in Russia and of the Russian Government, as reported by the President, is approved, ratified and confirmed."

The President of Guaranty Trust Company mentioned in these minutes was Mr. Charles H. Sabin. Mr. Sabin died on October 10, 1933.

5. Exhibit 21 attached hereto is a true photostatic copy of an original letter in the files of Guaranty Trust Com-
[fol. 131] pany over the signature of Charles E. Hughes, Secretary of State, dated December 2, 1921. The Mr. Powell mentioned in the pencil note at the upper left hand corner of such letter is and was in 1921 one of the Assistant Comptrollers of Guaranty Trust Company acting under my supervision, and the pencil note at the foot of such letter reading

"Minister of Finance Imperial Russian Gov. $5,001,849.49 merged with Russian Gov. a/c"

is in his handwriting. Exhibit 22 attached hereto is a true photostatic copy of a carbon copy of letter in the files of Guaranty Trust Company addressed by the Chairman of the Board of Guaranty Trust Company to Hon. Charles E. Hughes, Secretary of State, on December 9, 1921. The initials C. H. S. on the second page of such letter are in the handwriting of Mr. Charles H. Sabin, who ceased to be President and became Chairman of the Board of Guaranty Trust Company on October 5, 1921. Exhibit 23 attached hereto is a true photostatic copy of an original letter in the files of Guaranty Trust Company over the signature of Charles E. Hughes, Secretary of State, dated January 17, 1922.

Stuart H. Patterson.

Sworn to before me this 17th day of October, 1935.
Harry Rode, Notary Public, Queens County.

[fol. 132] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WILLIAM C. CANNON

STATE OF NEW YORK,
County of New York, ss:

William C. Cannon, being duly sworn, says:

I am an attorney and counselor at law and member of the firm of Davis Polk Wardwell Gardiner & Reed, formerly Stetson Jennings & Russell, with which I have been associated since 1906. I was well acquainted with Mr. Charles H. Russell, who was a member of that firm and its predecessors from 1880 on and who died on February 19, 1921.

1. Mr. Russell advised Mr. Charles H. Sabin, President of Guaranty Trust Company of New York, and Mr. Stuart H. Patterson, Comptroller of that Company, in 1918 and 1919 with reference to the problems created by the Soviet Government's nationalization of the Russian private banks. I was informed by Mr. Russell and was generally familiar [fol. 133] with the fact that he was considering this problem and advising Guaranty Trust Company thereon.

2. In the correspondence files of my firm containing correspondence relative to the Russian matters of Guaranty Trust Company of New York appears a letter from Coudert Brothers, counselors at law, addressed to Mr. Russell under date of June 17, 1919. A photostatic copy of this letter is attached marked Exhibit 10. In the same files appears another letter addressed by the same firm to Mr. Russell under date of June 18, 1919, of which a photostatic copy is attached marked Exhibit 11. The words "Russian Government" written at the head of this letter in pencil are in Mr. Russell's handwriting.

In the same files under date of June 19, 1919, appears a carbon copy of a letter of acknowledgment of the enclosures referred to in Exhibit 11, addressed to Coudert Brothers, for the attention of Mr. Murray. Immediately following this acknowledgment in the same files of my firm appears a typewritten memorandum by C. H. R. (Mr. Russell) of conversation held on June 26, 1919, with Mr. Murray of Coudert Brothers, the memorandum being entitled "Russian Government Deposit." A photostatic copy

of this memorandum is attached hereto marked Exhibit 12. The ink interlineation "of Coudert Brothers" is in the handwriting of Mr. Russell.

The next paper in the same files of my firm is a carbon copy of letter from Mr. Russell to Coudert Brothers dated July 1, 1919, returning the papers enclosed with their letter [fol. 134] of June 18th. A photostatic copy of this carbon is hereto attached marked Exhibit 13. The caption "Russian Government" and the initials "C. H. R." written thereon are in the handwriting of Mr. Russell.

The next paper in the said files is a copy of the letter from S. Ughet, Charge d'Affaires ad Interim of Russia, dated July 1, 1919, to John H. Fulton, Esq., Chairman of the Protective Committee for the 6½% $50,000,000 Credit, of which a copy was marked Defendant's Exhibit 1 for Identification on the deposition herein of Serge Ughet. The next following paper in the said files of my firm is a copy of letter from J. H. Fulton to Guaranty Trust Company dated July 3, 1919, of which a copy is attached hereto marked Exhibit 14. The next following paper in the said file is a copy of letter subscribed by "President" to J. H. Fulton, Chairman of the Protective Committee for the 6½% $50,000,000 Russian Credit, and dated July 10, 1919, of which a copy was marked on the deposition of Mr. Serge Ughet herein Defendant's Exhibit 3 for Identification. The next following paper is a letter from Guaranty Trust Company to Mr. Russell dated July 11, 1919, with which the three copies of letters last above mentioned were evidently enclosed and of which a photostatic copy is hereto annexed marked Exhibit 15. The words "Russian Government" on said letter are in Mr. Russell's handwriting.

3. I was not present at the conference of June 26, 1919, between Mr. Russell and Mr. Murray, described in Exhibit [fol. 135] 12. I understand that the said Mr. Murray died two or three years ago.

William C. Cannon.

Sworn to before me this 17th day of October, 1935.
Wm. H. Bruder, Notary Public, Bronx County
No. 122.

[fol. 136] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SAMUEL W. REYBURN

STATE OF NEW YORK,
County of New York, ss.:

Samuel W. Reyburn, being duly sworn, says:

I am engaged in business in the City of New York as President of the Associated Dry Goods Corporation of New York, and have my office and place of business at 366 Fifth Avenue.

In 1894 I was graduated from Arkansas University Law School and was admitted to practice law in Arkansas State and Federal Courts, and followed that profession for several years.

In 1899 I acquired an interest in a real estate and mortgage loan brokerage business, and with that as a foundation, proceeded as the chief executive to build up a general banking and trust company business, of which I was the directing head until 1914, when I moved to New York.

[fol. 137] In and about the year 1923, I was a director of the Guaranty Trust Company of New York, and in the Spring of that year, acted as a member of the Board of Directors which examined the Bank as of March 2, 1923, in compliance with the provisions of the State Banking Law. As I attended practically all the meetings of the Committee, I became familiar with its important problems, and then first became acquainted with the details of its Russian accounts hereinafter described.

I was selected as a member of the Examining Committee for the year of 1924, and acted as Chairman in the examination as of March 7, 1924. This Committee consisted of Mr. E. R. Stettinius (now deceased), and Mr. Eugene G. Grace, as well as myself. Its report to the President of the Guaranty Trust Company was made under date of April 25, 1924.

With my experience as a lawyer and as the chief executive of a bank through so many years, and the experience on this Examining Committee the previous year, I exerted every effort to make the examination a most thorough and searching one. All of the more important accounts were discussed at length and in detail with the respective officers

directly in charge of the handling of such accounts. Among the accounts which I examined were the socalled Russian accounts of Guaranty Trust Company of New York, consisting of dollar balances formerly owed by the Trust Company to the Russian Government and to various Russian banks, and of the Trust Company's memorandum accounts reflecting ruble deposits in Russia owed to it by various Russian banks.

[fol. 138] The books of the Trust Company showed that these said former dollar accounts had been closed and set off against the dollar value of the ruble accounts owed to the Guaranty Trust Company so as to leave on the net balance a considerable sum owed to the Guaranty Trust Company by the Russian Government.

I examined Mr. Charles H. Sabin, then Chairman of the Board of the Guaranty Trust Company, at length about this account, the offset and the component parts. One of the component parts was a balance of approximately $5,000,000 which had stood with the Guaranty Trust Company in 1917 to the credit of the Russian Government Ministry of Finance. Mr. Sabin explained that when the de facto Russian Government asserted ownership of the banks in that country and took over their assets, it refused to honor the obligations due the Guaranty Trust Company, and he, as President of the latter Company, in its name informed the representatives of the Russian Government in this country that the Trust Company would not pay the balance due to the Russian Government, and consolidated the debit and credit balances so that that account would offset moneys due the Guaranty Trust Company which the Russian Government had refused to pay.

At this late date I cannot remember dates and names and actual questions and answers that passed between Mr. Sabin and myself in 1924 with respect to the Russian account, but I am confident that I was very thorough in this matter and that he gave me every assurance that was necessary to indicate the statute of limitations had begun to run on this transaction. As a lawyer, and for fifteen years the chief executive of a bank, I knew that with regard to [fol. 139] a deposit in a bank, the statute could not begin to run until the bank refused payment.

During the Committee's work on examining the bank, Mr. Stettinius had to leave for his health. On his return, the report I had prepared was submitted to him, and I took a

large part of two days in helping him make a very careful review of all the Committee's work in making the examination. Literally he went through this report word for word, and suggested a great many acceptable changes. He was entirely satisfied with the explanation I gave and joined me in signing the report.

With respect to the Russian accounts above described this report as prepared by me and as signed by the Committee contained the following language:

"The status of the Russian accounts improves on account of the statute of limitations with the lapse of time."

I am sure that I would not have employed this language in the report unless I had received information from Mr. Sabin that the statute of limitations with respect to the $5,000,000 Russian Government account had already begun to run by virtue of a refusal of payment communicated by Guaranty Trust Company to the Russian Government.

Samuel W. Reyburn.

Sworn to before me this 25th day of September, 1935.
John McDonnell, Notary Public, Queens County
No. 2649.

[fol. 140] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE B. LINK

STATE OF NEW YORK,
County of New York, ss:

George B. Link, being duly sworn, says:

I am and have been since May 1917 in the employ of The National City Bank of New York, a corporation under the National Banking Law, with its principal office and place of business at No. 55 Wall Street, New York, N. Y., and am in charge of the Russian division of that bank.

The original letter from Charles H. Sabin as President of Guaranty Trust Company to J. H. Fulton as Chairman of the Protective Committee for the 6½% $50,000,000 Russian Credit, dated July 10, 1919, of which a photostatic copy is hereto attached as Exhibit 3A, and the original letters from Serge Ughet as Charge d'Affaires ad Interim of Russia to

National City Bank of New York and others dated June 16 and July 8, 1919, of which photostatic copies are hereto at-
[fol. 141] tached marked Exhibits 16 and 16A respectively, are in the files of National City Bank, and said exhibits are true copies thereof. On the date of said letters John H. Fulton, was a Vice-President of National City Bank of New York. I am informed that he died on or about September 25, 1927.

I have carefully examined the files of National City Bank of New York and caused a search thereof to be made for the original letter from S. Ughet, Charge d'Affaires ad Interim of Russia, to John H. Fulton as Chairman, etc., dated July 1, 1919, of which a copy is attached hereto marked Defendant's Exhibit 1 for Identification, and also for initialed carbon copies of the letter from J. H. Fulton as Chairman, etc., to Guaranty Trust Company dated July 3, 1919, of which a copy is attached hereto marked Exhibit 14, and of letter from J. H. Fulton as Chairman to S. Ughet, Charge d'Affaires ad Interim of Russia dated July 11, 1919, of which a copy is attached hereto marked Defendant's Exhibit 2 for Identification. I have not been able to find in said files the original letter or the initialed carbon copies described, although said files do contain in correct chronological order corresponding to the dates on the said respective exhibits correct copies thereof. It is the custom of the National City Bank of New York from time to time to destroy old and obsolete papers and files having to do with transactions believed to be closed.

The contract under which the $50,000,000 Credit was extended to the Russian Government by the banking syndicate as described in Defendant's Exhibit 1 for Identification provided that interest and principal on the said credit should be
[fol. 142] payable by The National City Bank of the City of New York out of funds provided for that purpose by the Russian Government. Guaranty Trust Company of New York was a member of said banking syndicate. Interest on the credit fell due quarterly on January 10th, April 10th, July 10th and October 10th of each year, the last interest instalment falling due July 10, 1919. The credit matured on June 18, 1919.

George B. Link.

Sworn to before me this 18th day of October, 1935.
Philip D. Ferrall, Notary Public, Kings County.

[fol. 143] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE J. KENNY

STATE OF NEW YORK,
County of New York, ss:

George J. Kenny, being duly sworn, says:

I am Secretary of the Certificate Holders' Protective Committee for the Imperial Russian Government $50,000,000 6½% Three-Year Credit due June 18, 1919, and now in default, and in my said capacity have custody of the minutes of the Committee.

The attached seven photostatic pages marked Exhibit 18 are a correct copy of the original minutes of a meeting of the said Committee held on July 2, 1919, in my custody as aforesaid. The attached photostatic page marked Exhibit 19 is a correct copy of the original minutes of a meeting of the said Committee held on July 8, 1919, in my custody as aforesaid. The attached four photostatic pages marked Exhibit 20 are a correct copy of the original minutes of a meeting of the said Committee held July 11, 1919, in my custody as aforesaid.

[fol. 144] I have examined the files of the said Committee in my custody for the original letter from S. Ughet as Charge d'Affaires ad Interim of Russia to J. H. Fulton as Chairman of the said Committee dated July 1, 1919, and for carbon file copies of the letter from J. H. Fulton as Chairman to Guaranty Trust Company dated July 3, 1919, and the letter from J. H. Fulton to S. Ughet as Charge d'Affaires ad Interim dated July 11, 1919 (of all of which copies are set forth in the said minutes Exhibits 18, 19 and 20), but the said original letter and the said carbon copies do not appear in the files or records of the Committee.

George J. Kenny.

Sworn to before me this 10th day of October, 1935. Marc A. Rieffel, Notary Public. N. Y. Co. Clerk's No. 91, Register's No. 7-R-245. Term expires March 30, 1937. (Seal.)

[fol. 145] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RODNEY DEAN

STATE OF NEW YORK,
County of New York, ss:

Rodney Dean, being duly sworn, says:

I am employed by the American Iron & Steel Institute, 350 Fifth Avenue, New York, N. Y. At the time of the formation of a Protective Committee for the $50,000,000 6½% Three Year Credit of the Imperial Russian Government due June 18, 1919, which was formed on or about July 1, 1919, I was appointed Secretary of that Committee and continued to act as such Secretary until about August 1921. During such period I was personally acquainted with Mr. Serge Ughet, Financial Attache to the Russian Embassy in the United States, and was familiar with his signature, of which a facsimile appears on Exhibit 16 attached hereto.

The attached photostats marked Exhibits 18, 19 and 20 are true copies of the minutes of meetings of said Protective Committee held on July 2, July 8 and July 11, 1919, [fol. 146] respectively, prepared and signed by me as Secretary, and the said exhibits bear facsimiles of my signature. After reading Exhibits 18, 19 and 20 and attempting thereby to refresh my recollection as to the facts stated therein, I find that I have no present recollection of any of those facts, either independently of the said exhibits or from present memory as refreshed thereby (except as hereinafter stated). The said respective minutes were, however, signed by me on or about the dates thereof respectively in the course of my duties as Secretary of the said Protective Committee, and I am confident that, when I signed these minutes, I knew that they contained correct statements of what occurred at the respective meetings. I fully believe and have no doubt that the facts stated to have occurred at the respective meetings are correctly stated. My reason for the two foregoing statements is that otherwise I would not have signed the original minutes of which Exhibits 18, 19 and 20 are photostatic copies.

To the best of my recollection the letter dated July 1, 1919, and set forth in Exhibit 18 and the letter dated July

10, 1919, and set forth in Exhibit 20, were original, signed letters. To the best of my recollection the letter dated June 9, 1919, and set forth in Exhibit 20 was not enclosed (either in copy or in original) with the letter dated July 11, 1919, to Mr. Ughet and set forth in Exhibit 20. My memory with regard to the letter dated July 11, 1919, has been refreshed by examination of a copy thereof attached hereto as Defendant's Exhibit 2 for Identification and bearing at the [fol. 147] lower left hand corner my initials which show that I prepared such letter for the signature of John H. Fulton.

Rodney Dean.

Sworn to before me this 15th day of October, 1935.
Sylvia A. Shaughnessy, Notary Public, Queens County.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ARTHUR B. HATCHER

STATE OF NEW YORK,
County of New York, ss:

Arthur B. Hatcher, being duly sworn, says:

[fol. 148] I am a Second Vice-President of Guaranty Trust Company of New York, and from 1907 to 1916 was secretary to Charles H. Sabin, then President of that Company. I am familiar with his signature from having seen him sign his name. The attached photostatic copy of letter marked Exhibit 3A to Mr. J. H. Fulton, Chairman of the Protective Committee for the 6½% $50,000,000 Russian Credit, etc., dated July 10, 1919, on the letterhead of Guaranty Trust Company of New York, which photostatic copy I have examined, bears a facsimile of the signature of the said Charles H. Sabin.

Arthur B. Hatcher.

Sworn to before me this 25th day of September, 1935.
W. H. Potter, Notary Public, Nassau Co. No. 1047.

[fol. 149] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF C. A. McKEON

STATE OF NEW YORK,
County of New York, ss:

C. A. McKeon, being duly sworn, says:

I am and have been since 1917 an employe of Guaranty Trust Company of New York in its Foreign Department. In that capacity I have had for a number of years a general familiarity with the files of Guaranty Trust Company relating to its foreign business, and have frequently made investigations in its archives for documents relating to the accounts of former Russian depositors. On several occasions within the last two years I and certain other employes of Guaranty Trust Company have made a thorough search in its archives, records and files for the original letter from J. H. Fulton as Chairman of a Protective Committee to Guaranty Trust Company dated July 3, 1919, of which a copy is attached hereto marked Exhibit 14; for the identical copy of letter from Serge Ughet as Charge d'Affaires ad Interim of Russia to the said Fulton dated July 1, 1919, [fol. 150] which is described in Exhibit 14 and of which a copy is attached hereto marked Defendant's Exhibit 1 for Identification; for the carbon file copy of a letter from Charles H. Sabin as President of Guaranty Trust Company to the said Fulton, dated July 10, 1919, of which a copy is attached hereto marked Defendant's Exhibit 3 for Identification; and for the carbon file copy of a letter from said Mr. Sabin to the said Ughet as Russian Financial Attache dated December 12, 1917, of which a copy is attached hereto marked Defendant's Exhibit 6 for Identification. We have not been able to find the said papers in said archives, records or files, although the files of Guaranty Trust Company do contain copies of the said papers.

I have personally made a thorough search of the archives, records and files of Guaranty Trust Company for the original incoming cablegram from Sahmen, Director of the Credit Chancery at Petrograd, to Guaranty Trust Company under date of January 23, 1917, of which a copy is attached hereto marked Exhibit 17, but have not been able to find the said cablegram.

In the last eighteen years the archives of Guaranty Trust Company have been moved three or four times and it is my belief that the papers above described were lost or mislaid in the course of one of such removals.

Chas. A. McKeon.

Sworn to before me this 16th day of October, 1935. H. A. Meinken, Notary Public, Nassau County No. 2048.

[fol. 151] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ARTHUR J. CAREY

STATE OF NEW YORK,
County of New York, ss:

Arthur J. Carey, being duly sworn, says:

I am and have been since September 17, 1916, continuously an employe of Guaranty Trust Company of New York in the Cable Department.

My duties in the Cable Department in January 1917 included receiving and copying out for the records of Guaranty Trust Company incoming cablegrams. Practically all cablegrams received from Europe at that time were in open language. It was my duty to receive the cablegram from the cable or telegraph company messenger, open it, and copy it in triplicate on the typewriter. The first copy was bound in a cable book, in chronological order with other cablegrams, segregated according to the country of origin. The second copy was marked by me for the attention of the particular department of Guaranty Trust Company which [fol. 152] it concerned. The third copy was sent in the mail to the sender of the cablegram as a confirmation of the message received. After copying out the original cablegram in this fashion and routing the various copies for disposition in the manner described, I would place the original cablegram in a basket on my desk for the files.

The foregoing was the usual and regular course of business in the handling of incoming cablegrams in the Cable Department of Guaranty Trust Company according to my knowledge as an employe engaged therein.

I identify the attached photostat of cablegram dated January 23, 1917, and marked Exhibit 17 as a correct copy of a copy of cablegram made by me on or about that date and now contained in a bound volume of incoming cablegrams in the archives of Guaranty Trust Company of New York. I am able to identify the cablegram by my initials A. J. C. typed thereon, which mean that I personally made the transcript from the original cablegram in the manner described and that the paper of which Exhibit 17 is a photostatic copy was typewritten by me and earmarked for binding for Guaranty Trust Company's archives in the manner above described.

Arthur J. Carey.

Sworn to before me this 9th day of October, 1935. H. A. Meinken, Notary Public, Nassau County No. 2048.

[fol. 153] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GRAYSON M.-P. MURPHY

STATE OF NEW YORK,
County of New York, ss:

Grayson M.-P. Murphy, being duly sworn, says:

I have read the affidavit of J. Paul Huber verified December 14, 1934 on the above named defendant's motion to take the testimony of Boris Bakhmetev and Serge Ughet by deposition on defendant's behalf.

During the period mentioned by Mr. Huber as that in which certain conversations were held between the late Mr. Charles H. Sabin, then president of the defendant, and Mr. Bakhmetev or Mr. Ughet, namely between February 1918 and 1922 or 1923 I was a director of the defendant and was well acquainted with Mr. Ughet and knew him to be diplomatic representative of the State of Russia in this country. I recall that some years ago Mr. Ughet said to me that he [fol. 154] had been informed by Guaranty Trust Company of New York that it refused to pay the former Russian Government account with the defendant. I do not remem-

ber having participated in any conversation on the subject between Mr. Sabin and Mr. Ughet.

Grayson M.-P. Murphy.

Sworn to before me this 25th day of February, 1935.
Samuel E. Gruman, Notary Public, Kings County.

[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EUGENE W. STETSON

STATE OF NEW YORK,
County of New York, ss:

Eugene W. Stetson, being duly sworn, says:

I am a vice president of Guaranty Trust Company of New York, and have read the affidavit of J. Paul Huber verified December 14, 1934 upon said defendant's motion to take the testimony of Boris Bakhmetev and Serge Ughet by deposition on behalf of defendant.

During part of the period mentioned by Mr. Huber as the time in which he believes that the late Mr. Charles H. Sabin, then president of the defendant, informed Mr. Bakhmetev or Mr. Ughet that the defendant recognized no credit balance as payable to the State of Russia and would not honor a demand, namely from 1917 to the autumn of 1921, I was [fol. 156] a member of the managing committee of the defendant. The managing committee was a small group of the senior executives who supervised the business of the bank. As such member of the managing committee, I recall that I was informed about the time mentioned by Mr. Huber that the defendant had informed representatives of the Russian Government that it would not pay the account formerly standing with the defendant in the name of the Russian Government Ministry of Finance. I do not definitely recall from whom I received this information, but believe it was from Mr. Sabin. I was not personally present

at any conversations between Mr. Sabin and Mr. Ughet or Mr. Bakhmetev on the subject, so far as I can remember.

Eugene W. Stetson.

Sworn to before me this 25th day of February, 1935. Frank A. Winterbottom, Notary Public Kings County.

[fol. 157] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CONRAD DE SAHMEN

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA,
French Republic,
City of Paris, ss:

Conrad de Sahmen, being duly sworn, deposes and says:

I reside in the city of Paris and have my office there at 37, Boulevard Malesherbes. I was formerly Director of the Chancellery of Credit of the Imperial Russian Ministry of Finance.

Early in 1936 I was asked by the United States Government to prepare answers to the following questions with respect to the former Ministry of Finance account with the Guaranty Trust Company of New New York and I, therefore, prepared my answers as follows to the said questions respectively, which answers are true to the best of my recollection and belief:

Question. For what period or periods were you associated with the Chancellery of Credit of Russian Ministry of
[fol. 158] Finance, Section Etrangère?

Answer. I was associated with the Chancellerie de Crédit, of which the "Section Etrangère" was a part—since 1896 when I entered the Civil Service. Having started as a junior clerc, I was gradually promoted to higher ranks, Vice-Director in January 1913 and Director in December 1916.

During the Great War I was delegated several times to represent the Russian Ministry of Finance abroad, the result of which was my temporary absence from Petrograd.

The periods of my absence were the following: January-February 1915, August 1915 to end of May old style (early June new style) 1916 and a fortnight later again, from end of June to July 1916.

From the end of July to the 11th November when I retired from the Civil Service I resided in Petrograd without interruption.

I see a misprint in my first affidavit in this case where it has been stated that I was acting de facto as Director of the Chancellerie since June (actually July) 1916.

(2) Question. Give a detailed statement of your duties in any such association?

Answer—Since the first days of my association with the Chancellerie de Crédit I had to deal with the foreign business of the Russian Ministry of Finance. I did not belong [fol. 159] to the "Section Etrangère" but was committed to audit the accountancy of the Section Etrangère, as far as I remember, since about 1905.

Since I was promoted to the Vice-Directorship of the Chancellerie de Crédit the Section Etrangère was under my direct orders.

(3) Question. State the terms, if you know, under which the Chancellery of Credit in July 1916 opened a deposit account with the Guaranty Trust Company of New York?

Answer. I cannot remember any special conditions made for the deposit account opened in 1916 with the Guaranty Trust Company. The conditions were the same as for all other similar accounts.

(4) Question. Exactly how were withdrawals made from this account with the Guaranty Trust Company of New York?

Answer. Withdrawals were made from all accounts either by cable or by letter. During the War this former way of disposal was normal. The cables were signed "Finetrange" no official being mentioned as signatory. A copy bearing the signature of the Chef (Director) de Section or his assistant was kept in the files of the Section Etrangère.

As regards the bank receiving the cable, the authenticity of same was checked by conventional reference numbers. Cables were being confirmed by letters.

[fol. 160] Letters had to bear two signatures. A list of officials entitled to sign on behalf of the Chancellerie (four or five in number) was sent from time to time to all banks concerned.

(5) Question. Did persons other than yourself have the authority to draw against this deposit account?

Answer. My statement referring to question 4 answers this question as well.

(6) Question. Did Mr. Boris Bakhmeteff, as Russian Ambassador, have the right to draw against this deposit account, and if so, under what conditions?

Answer. Mr. Boris Bakhmeteff was vested with extraordinary powers. He was the only Ambassador who held authority to dispose at his discretion of all accounts of the Russian Ministry of Finance (including those of the Section Etrangère). There were no conditions to this power. He held the same rights as the Minister of Finance.

(7) Question. To whom were statements and vouchers with respect to the condition of the account sent?

Answer. Statements and vouchers with respect to the accounts of the Section Etrangère were sent to this latter.

(8) Question. By whom were the last withdrawals from this deposit account made?

[fol. 161] Answer. As long as I was connected with the Chancellerie de Crédit only the Section Etrangère itself disposed of the account.

(9) Question. Do you know whether any demand was ever made on the Guaranty Trust Company of New York subsequent to December 12, 1917 for the payment of the sum of $4,976,722.78 or any part thereof, either by the Russian Embassy in this country, or anyone claiming an interest in said deposit account? State fully what you know in this connection?

Answer. I have no direct knowledge with regard to what happened after November 1917. I have only heard that a demand has been made on the Guaranty Trust Company by the Ambassador Mr. Boris Bakhmeteff consequent to arrangements he had made with the United States Treasury with regard*ing* to winding up of Russian contracts for war supplies.

After preparing the above answers I took them to the United States Consulate General in the city of Paris, where an affidavit was drawn up for my signature, containing substantially the questions and answers as above stated. I thereupon signed and sworn to this affidavit and handed it to an Officer in the American Consulate General. I did not retain a copy of this affidavit.

With respect to my answer to the seventh question above, I have no definite recollection as to whether statements and vouchers regarding the particular Ministry of Finance account with the Guaranty Trust were sent to Petrograd. As a general rule such statements and vouchers covering ac- [fol. 162] counts abroad of the Ministry of Finance were sent to Petrograd.

With respect to my answer to the ninth question, the knowledge therein stated was obtained by me in the course of conversations with Mr. Boris Bakhmeteff and Mr. Serge Ughet in and after 1919. I met Mr. Boris Bakhmeteff on numerous occasions when he came to Paris for the Peace Conference early in 1919. Mr. Bakhmeteff and Mr. Ughet, in the course of their conversations with me, in and about 1919, said in substance that the Russian Embassy in the United States had demanded payment of the Ministry of Finance account with the Guaranty Trust Company of New York, and that the Guaranty Trust Company had refused to pay.

In connection with the Peace Conference during 1919, Mr. Boris Bakhmeteff and I worked together on financial question- affecting the former Russian Imperial and Provisional Governments.

Conrad de Sahmen. C. Sahmen.

Sworn to before me, this fourteenth day of September 1936. John R. Wood, Vice-Consul of the United States of America at Paris, France. (Seal of American Consulate General.)

American Consulate General, $2.00 Fee Stamp, Sep. 14, 1936, Frs. 3100, 13773, Paris, France.

[fol. 163] DEFENDANT'S EXHIBIT 1

July 1, 1919.

John H. Fulton, Esq., Chairman of the Protective Committee, for the 6½% $50,000,000 Credit, The National City Bank of New York, 55 Wall Street, New York City.

DEAR SIR:

From the last reports from Paris of the Associated Press, the financial circles in New York have certainly

already learned the fact that the obligation of meeting the liabilities of the Russian National debt is one of the fundamental principles for the recognition by the Allied and Associated Powers of the Russian Government in Omsk, which obligations, besides the declaration of Admiral Kolchak of November 27th, 1918, has again been confirmed by Admiral Kolchak to the Peace Conference in Paris.

The last payment of the interest on this $50,000,000 6½% Credit becomes due July 10th involving the amount of $1,625,000.

The Protective Committee formed by the banking institutions participating in the Syndicate of Banks is cognizant of the fact that after the Bolshevik uprising in 1917 and contrary to the repudiation at that time of the foreign debts by the Bolsheviks, the Russian Embassy considered it its moral duty, in accordance with the traditions of National Russia to meet faithfully all her financial obligations, to [fol. 164] pay regularly the interest and the commission to the National City Bank as same became due. Out of the general funds at the disposal of the Russian Embassy with the National City Bank on this operation alone, the interest and the commission were paid on January 10th, April 10th, July 10th and October 10th, 1918, and on January 10th, April 10th, 1919, besides regular payments of interest on all other financial obligations of Russia in the United States.

Unfortunately, the Russian Embassy is now not in a position to meet the interest due July 10th out of its funds with the National City Bank owing to lack of same.

The Protective Committee is possibly aware that the Ministry of Finance of the Provisional Government of Russia had with the Guaranty Trust Company an account, the actual credit balance of which is approximately $5,000,000.

I beg to state that this account, as far as I can ascertain, was opened first with $25,000,000, being 50% of the proceeds of the above mentioned $50,000,000 operation. Later on other sums were credited to this account, but the main bulk of the funds constitutes the proceeds of the operation on which the interest becomes due July 10th.

The Russian Ministry of Finance, in establishing the banking credit with the Syndicate, had evidently no intention to issue for this specific operation bonds on behalf of the Russian Government on the open market, but the Min-

istry of Finance possibly understood at that time that the banking institutions, signatories to this agreement, would offer on their own behalf the participation in said operation to the American public.

[fol. 165] The form of the bonds, in which this participation has been offered to the open market by the Syndicate of the Banks, and upon which is printed in large character- "Imperial Russian Government" possibly led to the impression that these bonds represent a direct issue of the Russian Government. At least, in the financial sections of the New York papers the quotation of these bonds has always been given as "6½% Imperial Russian Government Bonds".

In my opinion, had this credit operation been limited to the above banking institutions alone, or, if the bonds had been issued in other form, the question of making an agreement with the Syndicate of the Banks relative to extending the credit and postponement of the payment of the interest would possibly have been facilitated as the interests of the open market would not have been involved and no publicity given to the failure of Russia to meet, for the first time, her financial obligations in the United States. My opinion on this question seems further strengthened by the fact that the next payment of interest by the Russian Government on their direct financial operations on the open market is not due until December 1, 1919, thus affording the Russian Government in Omsk sufficient time to make necessary financial arrangements.

I now venture to address the Protective Committee with the view of protecting the Russian National Credit in the United States, with the request to help us to meet the situation, and I beg the Syndicate of the Banks to do its utmost to pay the interest due on the bonds issued by the Syndicate on their own behalf.

[fol. 166] I believe that I am morally justified in making such a request and I am prepared to do everything in my power to assist the Syndicate of the Banks to meet the interest on their financial obligations, protecting thereby the Russian Credit in the United States, as well as the interests of the American holders of obligations issued by the Banks.

In view of the above, I have the honor to submit for the kind consideration of the Protective Committee the following proposal:

The Syndicate of the Banks to issue a request to the Guaranty Trust Company, holder of the funds of the Russian Ministry of Finance, to release and transfer $1,625,000 to the account of the National City Bank, as the representative of the said Syndicate, in order to meet the payment of the interest due by the Russian Ministry of Finance to the Syndicate. Such release of the funds should be made by the Guaranty Trust Company under joint guarantee of the banking institutions participating in the $50,000,000 Credit. On the other hand, the Syndicate of the Banks, so as to protect their own interests, to approach the United States Government with the request that it be confirmed to them that, in accordance with the actual policy of the Allied and Associated Powers, and particularly of the United States, it is not to be expected that formal recognition will be extended to any Russian Government which would not undertake to settle the Russian National debt.

The funds provided in such a way will enable the Syndicate of the Banks to meet their own obligations to the American holders and indirectly protect the Russian credit in the United States.

[fol. 167] I should be extremely obliged if the Protective Committee would let me know as promptly as possible if such a proposal meets their views and if the Committee is prepared to submit this suggestion to the Syndicate of the Banks.

I am, Dear Sir,

Very truly yours, (Signed) S. Ughet, Charge d'Affaires ad Interim of Russia.

DEFENDANT'S EXHIBIT 2

July 11, 1919.

Copied from "Trust Dept. Files—Corporate—Imperial Russian Government 6½s".

S. Ughet, Esq., Charge d'Affaires ad Interim of Russia, Russian Embassy, Washington, D. C.

DEAR SIR:

Replying to your letter of July 1, the Committee transmitted a copy of your letter to the Guaranty Trust Com-

pany inquiring if the Guaranty Trust Company were willing to release the sum of $1,625,000. to meet interest due July 10. The Committee has today received a reply from [fol. 168] Mr. Sabin, President of the Guaranty Trust Company, copy of which I enclose herewith.

With reference to the point which you raise regarding the issuance of Participation Certificates to others than the banks mentioned in the contract, the Committee is informed that in all the negotiations between the representatives of the banks and the Russian Ministry of Finance it was freely discussed and clearly understood that participation in the Credit would be offered to others in America than the banks themselves, and that the banks were simply acting as organizers and managers of an American Syndicate. This is in accordance with the general banking practice in connection with transactions of this magnitude, where the procedure always is for a few banks to organize for managing and distributing the loan among a large number of participants.

All of the above is in accordance with the spirit and content of the contract itself, which in no part contains any restriction as to the number of participants in the Credit.

Yours very truly, J. H. F., Chairman.

RD:ML.
Encl.

[fol. 169] DEFENDANT'S EXHIBIT 3

Copy

Copied from "Trust Dept. Files—Corporate—Imperial Russian Government 6½s".

Guaranty Trust Company of New York

140 Broadway, New York

July 10, 1919.

Mr. J. H. Fulton, Chairman of the Protective Committee for the 6½% $50,000,000. Russian Credit, 55 Wall Street, City of New York.

DEAR MR. FULTON:

In response to your letter of July 3rd enclosing a letter from Mr. Ughet, the Charge d'Affaires ad Interim of Rus-

sia, I wish to state, as I have previously stated, that no one now has authority to draw Russian Funds on deposit in this bank; therefore, we cannot act upon Mr. Ughet's suggestion. In order that your Committee may understand our position in this matter, I attach herewith copy of letter dated June 9th to the Counselor of the State Department at Washington, which I believe fully states our position.

Very truly yours, Charles H. Sabin, President.

1-1.

[fol. 170] DEFENDANT'S EXHIBIT 3A

Photostat of original letter of which Defendant's Exhibit 3 is a copy.

DEFENDANT'S EXHIBIT 4

Copy

Copied from "Trust Dept. Files—Corporate—Imperial Russian Government 6½s".

June 9, 1919.

Hon. Frank L. Polk, Counselor, Department of State, Washington, D. C.

DEAR FRANK:

Upon my return from Southampton this morning, I find your letter of June 4th.

The suggestion that the Russian Government deposit with the Guaranty Trust Company should be used, so far as necessary, to pay the interest falling due on June 18th on one of the Russian loans, was made at a recent conference of bankers here and has already been carefully considered by us.

We hold the deposit for account of "The Russian Government", and shall be under the duty to account for this deposit to a regular and responsible Russian Government whenever such a government is established and calls upon us to pay it or to apply it according to its direction. In the [fol. 171] meantime we can only hold it. We consider that we have no more right or authority to use it now to pay

interest on the bonds of a certain Russian loan than we should have to apply part or all of the deposit of any individual with us to the payment of such individual's debts upon our own initiative. Our action in using part of this deposit for such purpose might be disapproved by a future Russian Government.

If it is important that Russian credit in this country should be maintained or if for any reason whatever it is desirable in the interests of our country that the interest about to become due shall be paid, we stand ready to do our share with other financial institutions in helping to meet the emergency, but not because of any duty arising from the fact that we hold the deposit referred to.

Another Russian loan matures in 1921 and probably a similar question will arise at that time. I understand that there already have been defaults in England and France in the payment of interest on Russian loans; and I do not believe that the bondholders here will be surprised if their interest is not paid on June 18th next.

For these reasons we do not see our way clear to make use of any part of the Russian Government deposit for the purpose mentioned.

As you know, early in 1918 the present Government of Russia at that time and since in power at Petrograd and Moscow and other financial centres, absorbed all the commercial banks in Russia into the State Bank, seized all their assets and all deposits and credits of other institutions and individuals with them, decreed that the commercial banks had ceased to exist, and announced that it would liquidate [fol. 172] their liabilities. At that time we had accounts, including large deposits, in the Russian commercial banks in Russia. Under the circumstances, we considered it necessary and proper to consolidate the Russian Government account and the accounts of the Russian commercial banks, the results being, according to our computation, a credit balance in our favor. This situation, as you will readily understand, gives rise to certain questions which can be satisfactorily settled only upon the restoration or establishment of a responsible government in Russia, when undoubtedly all of them, in so far as they concern American financial interests, will, with the aid of our Government, be properly disposed of. In the meantime, however, as we regard it, both in considering the Russian Government account by itself, and in considering the consolidated account

referred to, any payment made by us now would leave us in a position where we might be required to pay the same amount again.

Very sincerely yours, (Sig.) Charles H. Sabin.

[fol. 173] DEFENDANT'S EXHIBIT 5

November 28, 1917.

DEAR SIRS:

I hereby declare that all moneys now standing at my disposal in various accounts with you and all moneys which may hereafter be deposited with you, subject to my order, are held by me and by my successors in office in trust to be applied for the following general purposes:

Payments on account of orders and contracts heretofore placed by the Russian Supply Committee or other Russian Departments for munitions, machinery; railway, material and equipment, rolling stock, clothing, shoes, leather, provisions and other various supplies for the Russian Army and Navy, also clothing, provisions, agricultural and other commodities for the civilian population of Russia. A list of such orders and contracts is on file in the office of the Financial Attache to the Russian Embassy. The sum alloted for this item amounts to —.

Such moneys shall be placed in a new account or accounts to be opened in my official name or in the name of such official as I shall designate and shall be applied only for the said purposes. Checks on the said account or accounts shall be signed by me in my official capacity or by my duly constituted successor in office in his official capacity or by such official of the Russian Government as I in my official capacity or my successor in office shall designate in writing to sign in his official capacity for the purpose.

[fol. 174] Any check signed as herein provided and so designated shall be deemed to have been drawn for and applied to the foregoing specified purposes so designated and shall constitute full authority to you to make the payment therein directed, and shall be full protection to you against any claim of any individual, cooperation [corporation] or government to the money so paid by you or to any part thereof.

No money so allocated can be taken for other purposes, except that, if, after all obligations have been met or the

liabilities thereunder otherwise terminated, any remaining balance can then be transferred at my free disposal or at the disposal of my duly constituted successor for any purposes of the Russian Government.

I beg to remain,

Yours very truly, —— ——, Ambassador of the Provisional Government of Russia.

The National City Bank of New York, New York City.

[fol. 175] DEFENDANT'S EXHIBIT 6

Copy

Guaranty Trust Company of New York,
140 Broadway, New York

December 12, 1917.

Mr. H. Ughet, Russian Financial Attache, Flatiron Building, New York City.

DEAR SIR:

We beg to refer to a copy of a letter which you have left with us dated November 28, 1917 addressed to The National City Bank of New York by His Excellency the Ambassador of the Provisional Government of Russia, in respect to the disposition of all moneys now standing at his disposal and all moneys which he may hereafter deposit.

There are no moneys deposited with this Company standing at the disposal of His Excellency. Of course, any money which His Excellency may hereafter deposit with us will be subject to his instructions, or those of his duly constituted successor.

We have, however, an account in which there is a balance of $4,976,722.78 standing to the credit of the Ministry of Finance, Section Etrangere. This was opened in July 1916, and moneys in this account may be paid out only upon the [fol. 176] signatures of two of certain designated officials of the Ministry of Finance.

It has been customary for us to honor cable instructions directing payments out of this account, which cable instructions have in each case been confirmed by proper written orders. Under present conditions, we do not see how we

can honor such cable instructions, nor do we see how we could honor written orders signed by the persons previously designated to draw on this account, without the assurance of our Government that such persons still have authority to act. Nor have we any authority for the transfer of these funds.

We must, therefore, for the present continue to hold these funds to the credit of such account.

Very truly yours, (Sig.) Charles H. Sabin, President.

CHS:L.

[fol. 177] DEFENDANT'S EXHIBIT 7

Copy

December 9, 1921.

Honorable Charles E. Hughes, Secretary of State, Washington, D. C.

Refer to R

SIR:

On December 2nd you wrote in regard to a credit of five million dollars which is supposed to stand on the books of our Company in favor of the Government of Russia, and I am pleased to supply you with the facts in connection with this matter.

The account was opened directly by the Russian Imperial Government and the balance at the time of the fall of the Kerensky Government was about $5,000,000. The Russian Ambassador in this country never had authority to draw on this account and never attempted to exercise any control.

Shortly after coming into power the Soviet Government took over and merged into the government treasury all banks in Russia, thereby confiscating their property and all balances therein, including those in favor of this Trust Company, representing in value over eight million dollars. As soon as we learned of this seizure early in 1918, we, on advice of counsel, applied the deposit account of the Russian Government with us as a partial offset against the greater amount due to us by the Russian Government through seizure of our property, and when there is a Government in Russia recognized by the United States we shall press our [fol. 178] claim for the balance due us, together with interest thereon.

After the fall of the Kerensky Government and the coming into power of the Soviet Government, the officials of the State Department and the Treasury Department took up the matter of this account with us with a view of having such funds thrown in with other Russian Government funds and used for the purpose of paying off the Russian debts to creditors in the United States. It is our understanding that after an investigation they came to the conclusion that these funds were not available for that purpose.

We deeply sympathize with the efforts to relieve the suffering in Russia but our loss is already so great that we cannot either morally or legally give up funds which have been applied as a partial offset to this loss.

Very truly yours, Charles H. Sabin, Chairman of Board.

(Initialed C. H. S.)

[fol. 179] DEFENDANT'S EXHIBIT 8

Financial Attache to the Russian Embassy

Room 901, Flatiron Bldg.,
New York, July 12, 1917.

Guaranty Trust Company, No. 140 Broadway, New York City.

DEAR SIRS:

Referring to your letter of July 2nd, I beg to enclose herewith check to your order for the sum of Five Million ($5,000,000) Dollars, to reimburse you for payment made by you to yourself for account of Banque Russo Asiatique, in accordance with cablegram received from Section Etrangere Ministere Finances.

The amount of $3,784,510.22 will serve as reimbursement to Section Etrangere Ministere Finances for the balance of the same account, which was debited on account of the above mentioned payment.

The amount of $1,215,489.78 will serve as reimbursement to yourselves, for the amount advanced to complete the above mentioned payment.

Yours truly, (Signed S. Ughet), Russian Financial Attache.

HAL*JL.
Enc.

[fol. 180] DEFENDANT'S EXHIBIT 9

July 13, 1917.

S. Ughet, Esq., Russian Financial Attache, Room 901, Flat-iron Bldg., New York City.

DEAR SIR:

We beg to acknowledge receipt of your favor of the 12th instant, enclosing check for $5,000,000 which we have passed to the credit of the account on our books of the Section Etrangere Ministere Finances.

We note that you advise that of the above amount, $3,784,-510.22 is to serve as a reimbursement to the Section Etrangere and $1,215,489.78 to ourselves in connection with the payment of $5,000,000 made by ourselves, to ourselves for account of the Banque Russo Asiatique under instructions of the Section Etrangere Ministere Finances.

However, we also wish to advise that after conferring with you and making the above $5,000,000 payment, we received instructions from the Chancellor of Credit, to advise the National City Bank of the exact amount of the overdraft appearing on our books and which was to be covered by them. In the interim, we had received a deposit of $100,000 for their credit and after charging up commission, cable charges, etc., we found that the debit appearing was $1,154,-918.13, and which amount we received from the National City Bank.

Accordingly, we have placed the total of the above $5,000,000 to the account as mentioned.

Thanking you, we are,

Yours very truly, —— ——, Treasurer.

NDP:AB:297

[fol. 181] DEFENDANT'S EXHIBIT 10

Letterhead of Coudert Brothers

June 17, 1919.

Messrs. Stetson, Jennings & Russell, Attention of Mr. Russell, #15 Broad Street, New York City.

DEAR SIRS:

Mr. Ughet the Russian Financial Attache who is also acting as the Russian Charge d'Affaires has just informed the

writer that Mr. Murphy of The Guaranty Trust Company said he would ask your Mr. Russell to discuss the legal situation with us in regard to the Russian fund of approximately $5,000,000., on deposit with it. If agreeable the writer will be pleased to call at your office tomorrow morning. Will you kindly telephone us?

Yours very truly, Coudert Brothers.

JPM-KM.

[fol. 182] DEFENDANT'S EXHIBIT 11

[In handwriting:] Russian Government

Letterhead of Coudert Brothers

June 18, 1919.

Messrs. Stetson, Jennings & Russell, #15 Broad Street, New York City

Attention of Mr. Russell.

DEAR SIR:

We are sending to you under separate cover the following:

(1) Record in Circuit Court of Appeals in Agency of Canadian Car v. American Can;

(2) Briefs in Circuit Court of Appeals;

(3) Opinion of Circuit Court of Appeals;

(4) Papers on motion for dismissal of suit in case of Russian Government v. Lehigh Valley Railroad;

(5) Brief submitted in support of the motion;

(6) Opinion of Judge Mayer in Russian Government v. Lehigh Valley Railroad Co., dated January 27, 1919.

Will you kindly return all of these papers at your convenience?

Yours very truly, Coudert Brothers.

JPM-KM.

Enclosures.

[fol. 183] DEFENDANT'S EXHIBIT 12

Russian Government Deposit

Memo. June 26, 1919. C. H. R.

In reply to enquiry, Mr. Murray of Coudert Brothers says that in his opinion the Ambassador is the Russian Government, and has the right to direct the Guaranty what to do with the Russian Government deposit; that, as held in the Lehigh Valley case, the Ambassador can institute an action against the Guaranty in the name of the Russian Government; that, under the opinion in the Can case, there can be no defence to a demand by the Ambassador; that we cannot go back of his authority as Ambassador, as shown by the State Department certificate; that in the case of a judgment against the Guaranty, it could pay by cheque to the order of the Russian Government, delivered to the attorneys for the Russian Government.

[fol. 184] DEFENDANT'S EXHIBIT 13

[In handwriting:] Russian Government

July 1, 1919.

Messrs. Coudert Bros., 2 Rector Street, New York City.

(Attention Mr. John P. Murray)

DEAR SIRS:

I beg to return to you herewith under separate cover the various printed and other papers which you were so good as to send to me for examination on June 18th.

Thanking you for your kindness in giving me an opportunity to examine these papers, I am,

Very truly yours, C. H. R.

CHR FAF.

[fol. 185] DEFENDANT'S EXHIBIT 14

July 3rd, 1919.

Guaranty Trust Company, 140 Broadway, New York City.

GENTLEMEN:

As Chairman of the Protective Committee for the 6½% $50,000,000 Russian Credit, I send to you herewith a copy

of a letter which has just been received by me from Mr. Ughet, the Charge d'Affaires ad Interim of Russia.

On behalf of the Committee, I beg to inquire whether your Company will comply with the suggestion to transfer to the National City Bank the sum of $1,625,000 in order to pay six months interest on the credit to July 10th, 1919.

Yours very truly, (Signed) J. H. Fulton, Chairman of the Protective Committee for the 6½% $50,000,000 Credit.

[fol. 186] DEFENDANT'S EXHIBIT 15

[In handwriting:] Russian Government

Letterhead of Guaranty Trust Company of New York

July 11, 1919.

Mr. Chas. H. Russell, % Messrs. Stetson, Jennings & Russell, 15 Broad Street, New York City.

DEAR MR. RUSSELL:

In accordance with your request to Mr. Jay I am enclosing copies of the following letters for your files: letter of Mr. Ughet to Mr. Fulton, Chairman of the Protective Committee; a letter from Mr. Fulton to Mr. Sabin and the reply of Mr. Sabin to Mr. Fulton.

Yours very truly, Raleigh S. Rife.

313:37.
Enc.

[fol. 187] DEFENDANT'S EXHIBIT 16

Russian Embassy, Washington

June 16, 1919.

To Messrs. J. P. Morgan & Co., The National City Bank of New York, Guaranty Trust Co. of New York, Lee Higginson & Company, Kidder, Peabody & Company.

GENTLEMEN:

On behalf of the Government of Russia, I desire to announce that due to circumstances beyond control I shall

be unable to provide funds to meet at maturity the Imperial Russian Government $50,000,000 6½% Three-Year Credit.

I have been in communication with the All-Russian Government in Omsk, under Admiral Kolchak, and, while I have received no reply as yet, the published accounts of Admiral Kolchak's communication to the Allied Governments clearly state that the external obligations of the Russian Government issued prior to November 1917 will be recognized. I am sure this matter has been given earnest and serious consideration, and I am confident that the holders of this obligation may reasonably expect arrangements to be made for the payment of this debt as soon as the All-Russian Government is formally recognized.

Yours very truly, S. Ughet, Charge D'Affaires ad Interim of Russia.

[fol. 188] DEFENDANT'S EXHIBIT 16A

Russian Embassy, Washington

July 8, 1919.

To Messrs. J. P. Morgan & Company, The National City Bank of New York, Guaranty Trust Company of New York, Messrs. Lee Higginson & Company, Messrs. Kidder, Peabody & Company.

GENTLEMEN:

I wish to announce on behalf of the Government of Russia that temporarily we have not at our disposal sufficient funds in order to meet the payment of half-yearly interest due by the Russian Ministry of Finance to the Syndicate of the Banks on the $50,000,000. 6½% three-year credit when this interest falls due.

From the published accounts of statements by Admiral Kolchak, Supreme Chief of the All-Russian Government in Omsk, to the Allied Governments, as well as from my communications with the All-Russian Government in Omsk, it is absolutely clear that the External obligations of the Russian Government issued prior to November 1917 will be recognized and I have to state most emphatically that (to) the matter of meeting the principal and interest on

the $50,000,000. 6½% three-year credit is given most earnest and serious consideration and arrangements will be [fol. 189] made for the payment of this debt as soon as the All-Russian Government is formally recognized.

Yours very truly, S. Ughet, Charge D'Affaires ad Interim of Russia.

O. K. to send out circular. L. H. & Co.

(Notice sent out on ticker by J. H. F.)

SU:LM.
J. D. J.

DEFENDANT'S EXHIBIT 17

Translation of Cable Received

No. 8417 New York, Jan. 23, 1917.

Taken up by | From Samen Directeur Chancellerie Operations Credit, Petrograd

BKg Dept | We have the honor to inform you Mr. Ughet has been appointed representative New York Ministère Finance Russie we beg you to give him possible assistance
No. 1986

Entered by A. J. C. Checked by J. N. Cable Charges.

[fol. 190] DEFENDANT'S EXHIBIT 18

A meeting of the Committee appointed to act under the Protective Agreement of holders of Certificates of Participation in the Imperial Russian Government $50,000,000.00 6½% Three Year Credit, due June 18, 1919, was held at #55 Wall Street, New York City, on July 2, 1919, at 3:30 o'clock, P. M.

Present: Messrs. Fulton, Jay, Smith, Sargent and Allen, constituting a majority of the Committee, and Mr. John A. Garver, counsel. Mr. Whitney was also present, representing Mr. Cochran of J. P. Morgan & Company.

Upon the recommendation of Messrs. Allen and Sargent, the Old Colony Trust Company, of Boston, Massachusetts, was appointed sole Depository in that city.

It was the opinion of all present that the members of the Committee should serve without compensation. In view of this it was decided that the maximum assessment under the Protective Agreement be reduced from $10 to $5 per $1,000. Certificate, or ½ of 1%. It was also decided to strike out the clause in Article 4 of the Protective Agreement, providing that the Agreement should not become operative until the owners of at least a majority of the entire issue should become parties to the Agreement.

On Motion, duly seconded, it was unanimously

Resolved, that the form of Agreement now presented, with changes as indicated above, be approved; and that The National City Bank of New York be appointed Depository [fol. 191] thereunder in the City of New York; and that the Old Colony Trust Company, of Boston, Massachusetts, be appointed Depository in that city, with the duties and authority therein provided.

The Chairman presented the following form of Certificates of Deposit to be issued by the Depository in exchange for Certificates of Participation:

No—. $— Par Value.

Certificate of Deposit of Participation Certificates in the Imperial Russian Government $50,000,000.00 6½% Three Year Credit

Due June 18, 1919

This Certifies that —— —— is entitled to an interest to the extent of $— par value in the $50,000,000.00 6½% Three Year Credit of the Imperial Russian Government, due June 18, 1919. The Certificates of Participation, representing such interest, have been deposited with the undersigned, as Depository, pursuant to a certain Protective Agreement, dated July 1, 1919, executed between John H. Fulton, and others, who are thereby appointed a Committee on behalf of the subscribers thereto and depositors thereunder and the undersigned as Depository, a copy of which Agreement is on file in the office of the undersigned. [fol. 192] The holder hereof takes and holds this Certificate subject to each and every of the terms and conditions of the

said Agreement and, by accepting this Certificate, assents thereto to the same extent as if he had personally executed the said Agreement.

This Certificate, and the rights and benefits evidenced hereby, are transferable by the holder in person, or by attorney thereunto duly authorized, on (the) books to be kept for that purpose by the undersigned. By the transfer of this Certificate, the transferor shall ipso facto part with all his rights in and to this Certificate, and all rights and benefits under the said Agreement represented hereby.

Dated, ——— —, ——.

The National City Bank of New York, as Depository, by ——— ——. Old Colony Trust Company, as Depository, by ——— ——.

(Form of Assignment on back.)

For value received —— hereby sell, assign and transfer unto —— the within Certificate of Deposit representing $— par value of the Certificates of Participation in the Imperial Russian Government $50,000,000.00 6½% Three Year Credit, [fol. 193] due June 18, 1919, and do hereby irrevocably constitute and appoint ——— ——, attorney to transfer the said Certificate of Deposit on the books of the Depository therein named, with full power of substitution in the premises.

Dated ——— —, 19—.

——— ——.

In presence of: ——— ——.

Notice.—The signature to this assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement, or any change whatever.

On motion, it was unanimously

Resolved, that the form of Certificate of Deposit, now presented to this meeting be in all respects approved, and that, upon the presentation and surrender to the respective Depositories of Certificates of Participation in the Credit, the Depositories be respectively authorized to issue to the respective holders of Certificates of Participation so surrendered, Certificates of Deposit representing the same.

A letter from Mr. Max Levy was read by the Secretary, requesting, on behalf of Diana F. Levy, one of the security

holders, a statement of the operations of the Syndicate, with particular reference to the amount of funds on hand. The [fol. 194] Secretary was directed to reply substantially to the effect that proceeds of the operation had been turned over in full to the Russian Government.

The Secretary read a letter from one of the security holders, inquiring if, as a holder of record on June 18, 1919, he would retain the right to interest due on that date in case of subsequent sale of his holdings. It was the sense of the meeting that such right would not be retained without express reservation, and the Secretary was directed to reply to that effect.

The Chairman then presented the following letter from Mr. Ughet, Charge d'Affaires ad interim of the Russian Government, to the Protective Committee, which was read by the Secretary and referred to Counsel for action:

"July 1, 1919.

"John H. Fulton, Esq., Chairman of the Protective Committee for the 6½% $50,000,000. Credit, The National City Bank of New York, 55 Wall Street, New York City.

DEAR SIR:

"From the last reports from Paris of the Associated Press, the financial circles in New York have certainly already learned the fact that the obligation of meeting the liabilities of the Russian National debt is one of the fundamental principles for the recognition by the Allied and Associated Powers of the Russian Government in Omsk, which obligation, besides the declaration of Admiral Kol- [fol. 195] chak of November 27th, 1918, has again been confirmed by Admiral Kolchak to the Peace Conference in Paris.

"The last payment of the interest on this $50,000,000. 6½% Credit becomes due July 10th involving the amount of $1,625,000.

"The Protective Committee formed by the banking institutions participating in the Syndicate of Banks is cognizant of the fact that after the Bolshevik uprising in 1917 and contrary to the repudiation at that time of the foreign debts by the Bolsheviks, the Russian Embassy considered it its moral duty, in accordance with the traditions of National

Russia to meet faithfully all her financial obligations, to pay regularly the interest and the commission to the National City Bank as same became due. Out of the general funds at the disposal of the Russian Embassy with the National City Bank on this operation alone, the interest and the commission were paid on January 10, April 10, July 10, and October 10, 1918, and on January 10 and April 10, 1919, besides regular payments of interest on all other financial obligations of Russia in the United States.

"Unfortunately, the Russian Embassy is now not in a position to meet the interest due July 10th out of its funds with the National City Bank owing to lack of same.

"The Protective Committee is possibly aware that the Ministry of Finance of the Provisional Government of Russia had with the Guaranty Trust Company on account, the actual credit balance of which is approximately $5,000,000.

"I beg to state that this amount, as far as I can ascertain, was opened first with $25,000,000. being 50% of the proceeds [fol. 196] of the above mentioned $50,000,000. operation. Later on other sums were credited to this account, but the main bulk of the funds constitutes the proceeds of the operation on which the interest becomes due July 10th.

"The Russian Ministry of Finance, in establishing the banking credit with the Syndicate, had evidently no intention to issue for this specific operation bonds on behalf of the Russian Government on the open market, but the Ministry of Finance possibly understood at that time that the banking institutions, signatories to this agreement, would offer on their own behalf the participation in said operation to the American public.

"The form of the bonds, in which this participation has been offered to the open market by the Syndicate of the Banks, and upon which is printed in large characters "Imperial Russian Government," possibly led to the impression that these bonds represent a direct issue of the Russian Government. At least, in the financial sections of the New York papers the quotation of these bonds has always been given as "6½% Imperial Russian Government bonds."

"In my opinion, had this credit operation been limited to the above banking institutions alone, or, if the bonds had been issued in other form, the question of making an agreement with the Syndicate of the Banks relative to extending the credit and postponement of the payment of the

interest would possibly have been facilitated as the interests of the open market would not have been involved and no publicity given to the failure of Russia to meet, for the first time, her financial obligations in the United States. My [fol. 197] opinion on this question seems further strengthened by the fact that the next payment of interest by the Russian Government on their direct financial operations on the open market is not due until December 1, 1919, thus affording the Russian Government in Omsk sufficient time to make necessary financial arrangements.

"I now venture to address the Protective Committee with the view of protecting the Russian National Credit in the United States, with the request to help us to meet the situation, and I beg the Syndicate of the Banks to do its utmost to pay the interest due on the bonds issued by the Syndicate on their own behalf.

"I believe that I am morally justified in making such a request and I am prepared to do everything in my power to assist the Syndicate of the Banks to meet the interest on their financial obligations, protecting thereby the Russian Credit in the United States, as well as the interests of the American holders of obligations issued by the Banks.

"In view of the above, I have the honor to submit for the kind consideration of the Protective Committee the following proposal:

"The Syndicate of the Banks to issue a request to the Guaranty Trust Company, holder of the funds of the Russian Ministry of Finance, to release and transfer $1,625,000. to the account of the National City Bank, as the representative of the said Syndicate, in order to meet the payment of the interest due by the Russian Ministry of Finance to the Syndicate. Such release of the funds should be made by the Guaranty Trust Co. under joint guarantee of the banking institutions participating in the $50,000,000. Credit. [fol. 198] On the other hand, the Syndicate of the Banks, so as to protect their own interests, to approach the United States Government with the request that it be confirmed to them that, in accordance with the actual policy of the Allied and Associated Powers, and particularly of the United States, it is not to be expected that formal recognition will be extended to any Russian Government which would not undertake to settle the Russian National debt.

"The funds provided in such a way will enable the Syndicate of the Banks to meet their own obligations to the American holders and indirectly protect the Russian credit in the United States.

"I should be extremely obliged if the Protective Committee would let me know as promptly as possible if such a proposal meets their views and if the Committee is prepared to submit this suggestion to the Syndicate of the Banks.

"I am, Dear Sir,

Very truly yours, (Signed) S. Ughet, Charge D'Affaires ad Interim of Russia."

The meeting then adjourned.

(Signed) Rodney Dean, Secretary.

[fol. 199] DEFENDANT'S EXHIBIT 19

A meeting of the Committee appointed to act under the Protective Agreement of holders of Certificates of Participation in the Imperial Russian Government $50,000,000 6½% Three Year Credit, due June 18, 1919, was held at #55 Wall Street, New York City, on July 8, 1919, at 2:15 o'clock, P. M.

Present: Messrs. Fulton, Jay, Smith, and Sargent, constituting a majority of the Committee, and Mr. John A. Garver, Counsel; Mr. Whitney, representing Mr. Cochran of J. P. Morgan & Company, and Mr. Sheldon, representing Mr. Allen of Lee, Higginson & Company.

The Chairman announced that on advice of Counsel he had transmitted to the Guaranty Trust Company a copy of the letter from Mr. Ughet, Charge d'Affaires ad interim of Russia, which was read at the last meeting, and had inquired if the Guaranty Trust Company were willing to release $1,625,000 to meet interest due July 10.

The Chairman announced that Mr. Ughet had received a cablegram from Admiral Kolchak, approving all of the acts of Mr. Ughet, in connection with the 6½% credit, and authorizing him, if requested, to issue scrip certificates to the committee for the interest. It was, however, decided that such scrip would have no special value, and might possibly prejudice the rights of the holders of the Participation Certificates.

A letter from Mr. George W. Markens was read by the Secretary, who was directed to acknowledge receipt.

The Chairman then presented a revised form of notice to [fol. 200] be sent to all holders of Certificates of Participation in the Credit.

On motion, duly seconded, it was

Resolved, that the form of notice now presented be approved, and that the Secretary be directed to send a copy to each holder of Certificates of Participation, at his address as registered with The National City Bank of New York, and to publish the same in New York and Boston newspapers.

The meeting then adjourned.

Rodney Dean, Secretary.

DEFENDANT'S EXHIBIT 20

A meeting of the Committee appointed to act under the Protective Agreement of the Holders of Certificates of Participation in the Imperial Russian Government $50,000,000 6½% Three Year Credit, due June 18, 1919, was held at #55 Wall Street, New York City, on July 11, 1919, at 11:30 o'clock, A. M.

Present: Messrs. Fulton, Jay, Smith, Sargent and Allen, constituting a majority of the Committee, and Mr. John A. Garver, Counsel. Mr. Ewing of J. P. Morgan & Company was also present.

The Chairman announced that he had received the following letter from Mr. Sabin, President of the Guaranty Trust Company, which was read by the Secretary:

[fol. 201]

"July 10, 1919.

Mr. J. H. Fulton, Chairman of the Protective Committee for the 6½% $50,000,000 Russian Credit, 55 Wall Street, New York City.

DEAR MR. FULTON:

"In response to your letter of July 3rd enclosing a letter from Mr. Ughet, Charge d'Affaires ad Interim of Russia, I wish to state, as I have previously stated, that no one now has authority to draw Russian funds on deposit in this bank, therefore we cannot act upon Mr. Ughet's suggestion. In

order that your Committee may understand our position in this matter, I attach herewith copy of letter dated June 9th to the Counselor of the State Department at Washington, which I believe fully states our position.

Very truly yours, (Signed) Charles H. Sabin, President."

(Enclosure.)

"June 9, 1919.

Hon. Frank L. Polk, Counselor, Department of State, Washington, D. C.

DEAR FRANK:

"Upon my return from Southampton this morning, I find your letter of June 4.

[fol. 202] "The suggestion that the Russian Government deposit with the Guaranty Trust Company should be used, as far as necessary, to pay the interest falling due on June 18 on one of the Russian loans was made at a recent conference of bankers here and has already been carefully considered by us.

"We hold the deposit for account of "the Russian Government", and shall be under the duty to account for this deposit to a regular and responsible Russian Government whenever such a government is established and calls upon us to pay it or to apply it according to its direction. In the meantime, we can only hold it. We consider that we have no more right or authority to use it now to pay interest on the bonds of a certain Russian loan than we should have to apply part or all of the deposit of any individual with us to the payment of such individual's debts upon our own initiative. Our action in using part of this deposit for such purpose might be disapproved by a future Russian Government.

"If it is important that Russian credit in this country should be maintained or if for any reason whatever it is desirable in the interests of our country that the interest about to become due shall be paid, we stand ready to do our share with other financial institutions in helping to meet the emergency, but not because of any duty arising from the fact that we held the deposit referred to.

"Another Russian loan matures in 1921 and probably a similar question will arise at that time. I understand that

there already have been defaults in England and France in the payment of interest on Russian loans; and I do not [fol. 203] believe that the bondholders here will be surprised if their interest is not paid on June 18 next.

"For these reasons we do not see our way clear to make use of any part of the Russian Government deposit for the purpose mentioned.

"As you know, early in 1918 the present government of Russia, at that time and since in power at Petrograd and Moscow and other financial centres, absorbed all the commercial banks in Russia into the State Bank, seized all their assets and all deposits and credits of other institutions and individuals with them, decreed that the commercial banks had ceased to exist, and announced that it would liquidate their liabilities. At that time we had accounts, including large deposits, in the Russian commercial banks in Russia. Under the circumstances we considered it necessary and proper to consolidate the Russian Government account and the accounts of the Russian commercial banks, the result being, according to our computation, a credit balance in our favor. This situation, as you will readily understand, gives rise to certain questions which can be satisfactorily settled only upon restoration or establishment of a responsible government in Russia, when undoubtedly all of them, in so far as they concern American financial interests, will, with the aid of our Government be properly disposed of. In the meantime, however, as we regard it, both in considering the Russian Government account by itself, and in considering the consolidated account referred to, any payment made by us now would leave us in a position where we might be required to pay the same amount again.

Very sincerely yours," ——— ———.

[fol. 204] It was decided to transmit the following letter to Mr. Ughet:

"July 11, 1919.

S. Ughet, Esq., Charge d'Affaires ad Interim of Russia, Russian Embassy, Washington, D. C.

DEAR SIR:

"Replying to your letter of July 1, the Committee transmitted a copy of your letter to the Guaranty Trust Com-

pany inquiring if the Guaranty Trust Company were willing to release the sum of $1,625,000 to meet interest due July 10. The Committee today received a reply from Mr. Sabin, President of the Guaranty Trust Company, copy of which I enclose herewith.

"With reference to the point which you raise regarding the issuance of Participation Certificates to others than the banks mentioned in the contract, the Committee is informed that in all the negotiations between the representatives of the banks and the Russian Ministry of Finance it was freely discussed and clearly understood that participation in the Credit would be offered to others in America than the banks themselves, and that the banks were simply acting as organizers and managers of an American Syndicate. This is in accordance with the general banking practice in connection with transactions of this magnitude, where the procedure always is for a few banks to organize for managing [fol. 205] and distributing the loan among a large number of participants.

"All of the above is in accordance with the spirit and content of the contract itself, which in no part contains any restriction as to the number of participants in the Credit.

Yours very truly, (Signed) John H. Fulton, Chairman."

The question of a formal announcement regarding payment of interest on the Credit was brought up, and it was decided that an announcement should be made by the Chairman to the effect that no funds were available for payment of this interest.

The meeting then adjourned.

Rodney Dean, Secretary.

[fol. 206] DEFENDANT'S EXHIBIT 21

Address Official Communications to The Secretary of State, Washington, D. C.

[In handwriting:] Mr. Powell, Asst. Comptroller.

(Seal)

Department of State, Washington

In reply refer to R. December 2, 1921.

Guaranty Trust Company, New York City, New York.

GENTLEMEN:

In connection with certain projects for the organization of relief for the famine sufferers of Russia, it has been reported to the Department of State that you have on your books a credit of approximately $5,000,000 in favor of the Government of Russia or of some organ of the Russian Government.

I should very much appreciate the receipt of any information which you may be able to give as to this matter in order that the Department may be informed of all the potential assets of the Russian people in this country.

I am, Gentlemen,

Your obedient servant, (Signed) Charles E. Hughes.

[fol. 207] DEFENDANT'S EXHIBIT 22

December 9, 1921.

Honorable Charles E. Hughes, Secretary of State, Washington, D. C.

SIR: Refer to R.

On December 2nd you wrote in regard to a credit of five million dollars which is supposed to stand on the books of our Company in favor of the Government of Russia, and I am pleased to supply you with the facts in connection with this matter.

The account was opened directly by the Russian Imperial Government and the balance at the time of the fall of the Kerensky Government was about $5,000,000. The

Russian Ambassador in this country never had authority to draw on this account and never attempted to exercise any control.

Shortly after coming into power the Soviet Government took over and merged into the government treasury all banks in Russia, thereby confiscating their property and all balances therein, including those in favor of this Trust Company, representing in value over eight million dollars. As soon as we learned of this seizure early in 1918, we, on advice of counsel, applied the deposit account of the Russian Government with us as a partial offset against the greater amount due to us by the Russian Government through seizure of our property, and when there is a Government in Russia recognized by the United States we shall press our claim for the balance due to us, together with interest thereon.

[In handwriting:] Minister of Finance, Imperial Russian Gov. $5,001,829.79, Merged with Russian Gov. a/c.

[fol. 208] After the fall of the Kerensky Government and the coming into power of the Soviet Government, the officials of the State Department and the Treasury Department took up the matter of this account with us with a view of having such funds thrown in with other Russian Government funds and used for the purpose of paying off the Russian Debts to creditors in the United States. It is our understanding that after an investigation they came to the conclusion that these funds were not available for that purpose.

We deeply sympathize with the efforts to relieve the suffering in Russia but our loss is already so great that we cannot either morally or legally give up funds which have been applied as a partial offset to this loss.

Very truly yours, —— ——, Chairman of Board.

[fol. 209] DEFENDANT'S EXHIBIT 23

Address Official Communications to The Secretary of State, Washington, D. C.

(Seal)

Department of State, Washington

In reply refer to So-861.51/1361.

January 17, 1922.

Guaranty Trust Company, 140 Broadway, New York City.

GENTLEMEN:

The Department acknowledges with thanks the receipt of your letter of December 9, 1921, furnishing information in regard to a credit of approximately $5,000,000 which had been reported to stand on the books of your Company in favor of the Government of Russia or of some organ of that Government. Your letter has enabled the Department to identify the reported credit with a sum which, according to the Department's information, was deposited with your Company on July 12, 1917, by Mr. Serge A. Ughet, Russian Financial Attaché. This sum is understood to have been deposited to reestablish an account originally established by the Foreign Section, Chancery of Credits, Ministry of Finance, of the Imperial Russian Government in 1916 [fol. 210] but overdrawn to the extent of $1,215,489.78 by a payment, on or about July 2, 1917, at the direction of the Foreign Section, of $5,000,000 for the account of the Russo-Asiatic Bank, Petrograd.

In this connection the Department notes your statement of your understanding that "after the fall of the Kerensky Government and coming into power of the Soviet Government" officials of the State Department and the Treasury Department investigated the possibility of the application of the above mentioned sum to the payment of certain Russian debts in the United States and concluded that this sum was not available for the purpose suggested. A careful search of the records of this Department and the records of the Treasury Department has failed to disclose that the two Departments came to the conclusion which you understand to have been reached. The records indicate that the two Departments did not acquiesce in the decision

of your Company to apply the sum in question as a partial offset against the sums said to have been seized by the so-called Soviet Government.

I am, Gentlemen,

Your obedient servant, (Signed) Charles E. Hughes.

[fol. 211] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DIRECTING TESTIMONY OF DOING TO BE TAKEN—January 6, 1936

The above named plaintiff having duly moved for an order of this Court directing that the testimony of Mahlon B. Doing be taken by deposition on behalf of the plaintiff for use by the plaintiff in opposition to the defendant's notice of motion, dated October 21, 1935, for the dismissal of the complaint, and said motion having come on regularly to be heard, now after reading the complaint herein, verified the 21st day of September, 1934, and after reading and filing the notice of motion herein, dated December 12, 1935, and after hearing Francis H. Horan, Assistant United [fol. 212] States Attorney for the Southern District of New York, of counsel for the plaintiff in support of said motion, and Davis Polk, Wardwell, Gardiner & Reed (Ralph Carson, Esq., of counsel) having appeared and not opposing the granting of said motion,

Now, on motion of Lamar Hardy, United States Attorney for the Southern District of New York, attorney for the plaintiff, it is

Ordered that Mahlon B. Doing, Esq. attend before any referee hereinafter designated by the Court in this action and give testimony as to certain negotiations between Coudert Brothers, as attorneys for Boris Bakhmetev as Ambassador of the State of Russia, and Stetson, Jennings & Russell, as attorneys for the defendant herein, relative to the disposition of a certain deposit account which is the subject of the above entitled action; and it is further

Ordered that Mahlon B. Doing, Esq. may submit his affidavit as to the aforesaid negotiations in lieu of any testimony hereinabove required.

Francis G. Caffey, U. S. D. J.

[fol. 213] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MAHLON B. DOING

STATE OF NEW YORK,
County of New York, ss:

Mahlon B. Doing, being duly sworn, deposes and says:

I have been associated with the firm of Coudert Brothers since July, 1916, and have been a member of the firm thereof since January 1, 1927.

John P. Murray was a member of the firm of Coudert Brothers at all times during my association with the firm up to January 1, 1927 and was in charge of the affairs of the Russian Government for which the firm was counsel during that entire period. During his membership in the firm I was his assistant, and since January 1, 1927 I have been in charge for the firm of all matters of the Russian Government, which we represented continuously until November, 1933, when the Government of the United States recognized the Union of Soviet Socialist Republics as the de jure Government of Russia.

[fol. 214] Since January 1, 1927 the files of our firm pertaining to the affairs of the Russian Government have been under my control, including a file entitled "Russian Government—Guaranty Trust Co. (Re Funds Deposited with Trust Company)."

I have within the past week examined the file above mentioned and annex hereto copies of the following correspondence from that file:

(1) Letter dated June 17, 1919, from John P. Murray of Coudert Brothers to Mr. Russell, of Stetson, Jennings & Russell, office carbon in our files, Exhibit "1".

(2) Letter dated June 18, 1919, from John P. Murray of Coudert Brothers to S. Ughet, Financial Attache to the Russian Embassy, office carbon in our files, Exhibit "2".

(3) Letter dated June 18, 1919, from John P. Murray of Coudert Brothers to Mr. Russell of Stetson, Jennings & Russell, office carbon in our files, Exhibit "3".

(4) Letter dated June 23, 1919, from John P. Murray of Coudert Brothers to S. Ughet, Financial Attache to the Russian Embassy, office carbon in our files; Exhibit "4".

(5) Letter dated June 24, 1919, from S. Ughet, Financial Attache to the Russian Embassy, to John P. Murray of Coudert Brothers, original in our files, Exhibit "5".

(6) Letter dated June 26, 1919, from John P. Murray of [fol. 215] Coudert Brothers to S. Ughet, Financial Attache to the Russian Embassy, office carbon in our files, Exhibit "6".

(7) Letter dated June 28, 1919, from John P. Murray of Coudert Brothers to S. Ughet, Financial Attache to the Russian Embassy, office carbon in our files. Exhibit "7" annexed is a duplicate office carbon copy of this letter.

(8) Letter dated July 1, 1919, from C. H. Russell of Stetson, Jennings & Russell to Coudert Brothers, original in our files, Exhibit "8".

(9) Letter dated July 1, 1919, from S. Ughet Financial Attache to the Russian Embassy, to John P. Murray of Coudert Brothers, original in our files, Exhibit "9".

(10) Letter dated July 8, 1919, from John P. Murray of Coudert Brothers to S. Ughet, Russian Financial Attache to the Russian Embassy, office carbon in our files. Exhibit "10" annexed is a duplicate office carbon copy of this letter.

(11) Letter dated July 14, 1919, from S. Ughet, Financial Attache to the Russian Embassy, to John P. Murray of Coudert Brothers, original in our files, Exhibit "11".

(12) Letter dated September 12, 1921 from Boris Bakhmeteff, Russian Ambassador to the United States, to John [fol. 216] P. Murray of Coudert Brothers, original in our files, Exhibit "12".

(13) Letter dated September 14, 1921 from John P. Murray of Coudert Brothers to Boris Bakhmeteff, Russian Ambassador to the United States, office carbon in our files, Exhibit "13".

(14) Letter dated September 21, 1921, from John P. Murray of Coudert Brothers to Allen Wardwell, office carbon in our files, Exhibit "14".

(15) Letter dated September 23, 1921 from John P. Murray of Coudert Brothers to Boris Bakhmeteff, Russian

Ambassador to the United States, office carbon in our files, Exhibit "15".

(16) Letter dated October 8, 1921, from D. Pertzoff of the office of the Financial Attache to the Russian Embassy, to John P. Murray of Coudert Brothers, original in our files, Exhibit "16".

(17) Letter dated October 14, 1921, from said D. Pertzoff to John P. Murray of Coudert Brothers, original in our files, Exhibit "17".

(18) Letter dated October 14, 1921, from John P. Murray of Coudert Brothers to said D. Pertzoff, office carbon [fol. 217] in our files, Exhibit "18".

Mahlon B. Doing.

Sworn to before me this 15th day of January, 1936.
Thomas B. Moran; Notary Public, Queens County.

[fol. 218] EXHIBIT "1", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

June 17, 1919.

Messrs. Stetson, Jennings & Russell, #15 Broad Street, New York City.

Attention of Mr. Russell

DEAR SIRS:

Mr. Ughet the Russian Financial Attache who is also acting as the Russian Charge d'Affaires has just informed the writer that Mr. Murphy of The Guaranty Trust Company said he would ask your Mr. Russell to discuss the legal situation with us in regard to the Russian fund of approximately $5,000,000, on deposit with it. If agreeable the writer will be pleased to call at your office tomorrow morning. Will you kindly telephone us?

Yours very truly, —— ——.

JPM:KM.

[fol. 219] EXHIBIT "2", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

June 18, 1919.

Russian Government—re Guaranty Trust Co.

S. Ughet, Esq., Financial Attache to the Russian Embassy, Russian Embassy, Washington, D. C.

DEAR MR. UGHET:

Today I had a lengthy conference with Mr. Russell, counsel for The Guaranty Trust Company. The discussion covered a wide range, but at the conclusion he admitted that the real question was, would The Guaranty Trust Company be able to successfully defend a suit if one was instituted in the name of the Russian Government? I advised him that you had no desire to commence a suit; that your relations with all the financial institutions had been very friendly and that you desired them to continue so. My interview with him was most pleasant and as bearing upon the question whether the Courts are bound by the action of our State Department and whether The Guaranty Trust Company could in the Court successfully defend a suit, I agreed to send him material for consideration. Enclosed you will find copy of a letter which I have this day written him.

During our interview I suggested that The Guaranty Trust Company would run no risk if it drew a check to the [fol. 220] order of the Russian Government provided that if the Bank which received such check for deposit guaranteed the endorsement in behalf of the Government. He said that that phase of the matter so far as he knew had never been presented to The Guaranty Trust Company and he did not know what would be the attitude of its officials. I told him that I was not sure that The National City Bank would guarantee your endorsement as Financial Attaché for Russia but that I could probably find out. He would not commit himself as to what The Guaranty Trust Company would do if a check was drawn to the order of the Russian Government and if the same was endorsed by you and if your endorsement was guaranteed by The National City Bank. He asked me to give him a little time to study the entire situation and more particularly the papers which I

am sending to him and I told him that perhaps in the meantime I could ascertain if it would be possible to have an endorsement in behalf of the Russian Government guaranteed by the Bank in which the check would be deposited.

From the way in which Mr. Russell spoke, I doubt if I will hear from him before Monday. Perhaps by that time you can let me know the chances of having an endorsement guaranteed.

Yours very truly, —— ——.

JPM:KM.
Enclosure.

[fol. 221] EXHIBIT "3", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

June 18, 1919.

Messrs. Stetson, Jennings & Russell, #15 Broad Street, New York City.

Attention of Mr. Russell

DEAR SIR:

We are sending to you under separate cover the following:

(1) Record in Circuit Court of Appeals in Agency of Canadian Car v. American Can;

(2) Briefs in Circuit Court of Appeals;

(3) Opinion of Circuit Court of Appeals;

(4) Papers on motion for dismissal of suits in case of Russian Government v. Lehigh Valley Railroad;

(5) Brief submitted in support of the motion;

(6) Opinion of Judge Mayer in Russian Government v. Lehigh Valley Railroad Co., dated January 27, 1919.

Will you kindly return all of these papers at your convenience?

Yours very truly, —— ——.

JPM:KM.
Enclosures.

[fol. 222] EXHIBIT "4", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

June 23, 1919.

Russian Government—re Guaranty Trust Company

S. Ughet, Esq., Financial Attache to the Russian Embassy, Suite 1811, Flatiron Bldg., New York City.

DEAR MR. UGHET:

I have spoken to Mr. Russell and asked him if he had reached any conclusion in regard to the credit of The Guaranty Trust Company. He explained to me that he had been out of the City and had been unable to give the matter any further attention. I urged him to examine the papers which I submitted and let me know as soon as possible what conclusion he reaches. He said he would try to do so within the next few days.

In answer to an inquiry as to whether I could inform you that I would hear from him by Friday he replied that he would do his best but that he would not definitely promise, protesting that he was quite overwhelmed with work. Of course, it may be that The Guaranty Trust Company had informed him that there is no special hurry. I know of no way in which I can expedite his opinion except by communicating with him from time to time. This course I will pursue unless I hear from you not to do so.

Yours very truly, —— ——.

JPM:KM.

[fol. 223] EXHIBIT "5", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Financial Attache to the Russian Embassy

New York, June 24, 1919.

1-3749.

J. P. Murray, Esq., Coudert Bros., #2 Rector Street, New York City.

DEAR MR. MURRAY:

Your letter of yesterday's date in re Russian Government vs. Guaranty Trust Company came duly to hand and I

note the evasive replies given you by Mr. Russell, and that there is no way to make sure that his reply should reach you by Friday next.

I appreciate indeed the trouble you have taken in this matter and shall feel obliged if you please remind the Counsel of the Guaranty Trust Company, from time to time, that an answer is expected.

I am, dear Mr. Murray,

Yours very truly, S. Ughet, Russian Financial Attache.

JJ:LM.

[fol. 224] EXHIBIT "6", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

June 26, 1919.

Russian Government—Guaranty Trust Company

S. Ughet, Esq., Financial Attache to the Russian Embassy, Russian Embassy, Washington, D. C.

DEAR MR. UGHET:

Today I again spoke to Mr. Russell, counsel for The Guaranty Trust Company and had quite a lengthy conversation with him from which I rather drew the inference that he does not now seriously dispute our legal views. He promised to confer with the officers of The Guaranty Trust Company today or tomorrow and to let me know their conclusion.

Your very truly, —— ——.

JPM:KM.

[fol. 225] EXHIBIT "7" ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

June 28, 1919.

Russian Government—Guaranty Trust Company

S. Ughet, Esq., Financial Attache to the Russian Embassy, Suite 1811 Flatiron Bldg., New York City.

DEAR MR. UGHET:

Mr. Russell today explained to me that The Guaranty Trust Company does not feel that it can safely pay over

the $5,000,000, on the direction of the Russian Embassy without a judgment of a Court. In answer to a question as to whether The Guaranty Trust Company or he suggested that we should commence suit he replied "No," that he made no suggestion of any kind." He said that he had studied the American Can and Lehigh Valley Railroad Company cases and believed that he understood their force and effect. His clients, however, felt that the situation with regard to The Guaranty Trust Company is such that it cannot be settled until there is a staple Government in Russia. Its reasons are that it had credits with various Commercial Banks in Russia; that such Commercial Banks have been taken over by the Bolshevik Government and that while such Government is not recognized by the United States, still the Trust Company finds itself in the position of having a de facto Government take over property belonging to it exceeding in value the credit claimed by the Government recognized by the State Department of the United States.

As I understand Mr. Russell, the officials of the Trust Company believe that the Courts would sympathize with its position and probably delay any decision or any action until the establishment of a staple Government in Russia.

Yours very truly, —— ——.

JPM:KM.

[fol. 226] EXHIBIT "8", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

Stetson, Jennings & Russell,

Mills Building, 15 Broad Street,

New York, July 1, 1919.

Messrs. Coudert Bros., 2 Rector Street, New York City.

(Attention Mr. John P. Murray)

DEAR SIRS:

I beg to return to you herewith under separate cover the various printed and other papers which you were so good as to send to me for examination on June 18th.

Thanking you for your kindness in giving me an opportunity to examine these papers, I am,

Very truly yours, (Signed) C. H. Russell.

CHR:FAF.

[fol. 227] EXHIBIT "9", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

Financial Attache to the Russian Embassy

1-3894. New York, July 1st, 1919.

J. P. Murray, Esq., Coudert Bros., #2 Rector Street, New York City.

MY DEAR MR. MURRAY:

I beg to acknowledge receipt of your letter of June 28th in which you explain to me, in the light of information submitted to you by Mr. Russell, the position of the Guaranty Trust Company with reference to the $5,000,000. Credit held by them.

I should be very glad to hear your opinion about the following two principal things.

1. What exactly could be called a "de facto Government in accordance with the International Law and if any International practice exists with reference to this question.

To my understanding a de facto Government can be only such which controls the majority of a certain country, or is recognized as such by the Foreign Governments, as it is the case with the Carranza Government in Mexico.

[fol. 228] On a superficial analysis of the geographical map of the former Russian Empire it can be proven that what is now under the Bolshevik control is not at all the majority of the Russian territory. If we should start at the northwest and go around the Russian map we will see that the following territories are not under the Bolshevik control.

Finland, Livonia, Courland, Estonia, Lethvia, Lithuania, Poland, Bessarabia, Several Black Sea Ports, Crimea, Entire Caucasus, Cuban Cosaks Territory, Don Cosaks Territory, Ural Cosaks Territory.

All Siberia up to the Pacific Coast and the Northern Territory of Russia.

To give an appellation of de facto government of Russia to a physical force which controls only Central Russia and a part of South Russia together with North and Middle Volga region, is almost impossible and furthermore Bolsheviki have not been recognized as de facto Government by any country of the world. It puzzles me why the Guaranty Trust Company decides to call the Bolsheviki bands the de facto Government of Russia.

[fol. 229] 2. Mr. Russell, in accordance with your letter, states that while the funds of the Guaranty Trust Company have been seized by the Bolsheviki bands, who, quite naturally are not recognized by the United States, the Guaranty Trust Company is not releasing the funds of the Russian National Government; the latter, though not yet recognized by the United States Government, is being represented in this country by the Russian Embassy, which, while it stands for and voices the ideals of National Russia, is duly recognized as such by the State Department of the United States.

The National Russian ideals through the history of our country always had as one of their main principles the punctual settlement of our National obligations.

We are not even asking to release the money in favor of the Russian Embassy, but to turn over out of these funds only $1,625,000 to the Syndicate of the Banks which has been formed for the banking operation of $50,000,000 and of which the Guaranty Trust Company is one of the participants, in order to enable these Banks with $1,625,000 to meet the interest on their own obligations, and in such a way to at least partly protect the Russian credit in the United States.

The facts given in your letter might perhaps enable us to make a certain presentation to the State Department and I should be very glad to hear your opinion in this matter and if it appeals to you that something could be done along these lines, I should then be extremely obliged to you if you will prepare a draft of a letter to Mr. Polk and send it to me in Washington.

I am, my dear Mr. Murray,

Sincerely yours, (Signed) S. Ughet, Russian Financial Attache.

SU:LM.

[fol. 230] EXHIBIT "10", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

July 8, 1919.

Russian Government—re Guaranty Trust Company

S. Ughet, Esq., Financial Attache to the Russian Embassy,
Suite 1811 Flatiron Bldg., New York City.

DEAR MR. UGHET:

Since the receipt of your letter of the first I have made considerable research on the subject of "de facto Governments." The phrase does not seem to have any very definite meaning. It has been applied not merely to a case where superior force has overthrown the established Government of an entire country, but also to cases where superior force has taken possession of and ruled a comparatively small section of a country.

In one of the important cases growing out of the Civil War in this country, viz, Williams v. Bruffy reported in 96 United States at page 176 the Supreme Court wrote at page 185:

"We do not question the doctrines of public law which have been invoked, nor their application in proper cases; but it will be found, upon examination, that there is an essential difference between the government of the Confederate States and those de facto governments. The latter are of two kinds. One of them is such as exists after it has expelled the regularly constituted authorities from the seats [fol. 231] of power and the public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. Such was the government of England under the Commonwealth established upon the execution of the king and overthrow of the loyalists. As far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognized; and the rights acquired under it are, with few exceptions, respected after the restoration of the authorities which were expelled. All that counsel say of de facto governments is justly said of a government of this kind. But the Confederate government was not of this kind. It never represented the nation, it never expelled the public authorities from the

country, it never entered into any treaties, nor was it ever recognized as that of an independent power. It collected an immense military force, and temporarily expelled the authorities of the United States from the territory over which it exercised an usurped dominion; but in that expulsion the United States never acquiesced; on the contrary, they immediately resorted to similar force to regain possession of that territory and re-establish their authority, and they continued to use such force until they succeeded, it would be useless to comment upon the striking contrast between a government of this nature, which, with all its military [fol. 232] strength, never had undisputed possession of power for a single day, and a government like that of the Commonwealth of England under Parliament or Cromwell."

In a later case, Baldy v. Hunter, 171 United States, 388 the Court wrote at pages 400 and 401:

"From these cases it may be deducted—

"That the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

"That, within such territory, the preservation of order the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate States;

"That what occurred or was done in respect of such matters under the authority of the laws of these local de facto governments should not be disregarded or held to be invalid merely because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United [fol. 233] States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary

course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the de facto or unlawful government organized to effect a dissolution of the Union, were without blame, 'except when proved to have been entered into *with actual intent* to further invasion or insurrection;' and,

"That judicial and legislative acts in the respective States composing the so called Confederate States should be respected by the courts if they were not 'hostile *in their purpose* or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution.'

"Applying these principles to the case before us, we are of opinion that the mere investment by Hunter, as guardian of the Confederate funds or currency of his ward in bonds of the Confederate States should be deemed a transaction in the ordinary course of civil society, and not, necessarily, one conceived and completed with an actual intent thereby to aid in the destruction of the Government of the Union, if contracts between parties resident within the lines of the insurrectionary States, stipulating for payment in Confederate notes issued in furtherance of the scheme to overturn [fol. 234] the authority of the United States within the territory dominated by the Confederate States, were not to be regarded, for that reason only as invalid, it is difficult to perceive why a different principle should be applied to the investment by a guardian of his ward's Confederate notes or currency in Confederate bonds—both guardian and ward residing at that time, as they did from the commencement of the civil war, within the Confederate lines and under subjection to the Confederate States."

Some consideration has been given in the past by the Department of State to the effect of acts of Insurgents temporarily in control of a Government upon property of American citizens. Some secretaries have displayed a tendency to adopt doctrines which would protect the property of American citizens. Mr. Cass who was Secretary of State just before the Civil War maintained that "the citizens or subjects of a foreign nation may carry on commerce with the portions of a country in the hands of either of the parties to a Civil War and without awaiting any action on the part of their own Government" toward the recognition of the Insurgents. In fact, in some cases he seems to have gone

to the extent of claiming that those in temporary de facto control of a Government have an absolute right to dispose of the public property of a Nation. In 1858 he wrote to the Peruvian Minister as follows:

"It is the duty of foreigners to avoid all interference under such circumstances (in cases of civil war), and to [fol. 235] submit to the power which exercises jurisdiction over the places where they resort, and, while thus acting, they have a right to claim protection, and also to be exempted from all vexatious interruption, when the ascendancy of the parties is temporarily changed by the events of the contest. Undoubtedly the considerations you urge respecting the true character of an armed opposition to a government are entitled to much weight. There may be local insurrections, armed opposition to the laws, which carry with them none of the just consequences recognized by the law of nations as growing out of a state of civil war. No fixed principle can be established upon this subject, because much depends upon existing circumstances. Cases, as they arise, must be determined by the facts which they present; and the avowed objects of the parties, their relative strength, the progress they respectively make, and the extent of the movement, as well as other circumstances, must be taken into view.

"While contending parties are carrying on a civil war those portions of the country in the possession of either of them become subject to its jurisdiction, and the persons residing there owe to it temporary obedience. But when such possession is changed by the events of the war and the other party expels its opponents, the occupation it acquires carries with it legitimate authority, and the right to assume and exercise the functions of a government. But [fol. 236] it carries with it no right, so far, at any rate, as foreigners are concerned, to give a retroactive effect to its measures and expose them to penalties and punishments and their property to forfeiture for acts which were lawful and approved by the existing government when done."

From the above you can see that the state of the law is such that The Guaranty Trust Company might well argue with the State Department that strict legal rules should not be applied to take away from it the deposit of Russian funds which it now has and that the matter should be held

in abeyance until the company ascertains what has become of its property which was located in Russia.

From a strict legal standpoint The Guaranty Trust Company cannot assert that the Bolshevik Government is a Government de jure or de facto for the simple reason that our State Department has never recognized it in either aspect and the Supreme Court has decided in Jones v. United States, 137 U. S. page 212:

"Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this Court, and has been affirmed under a great variety of circumstances." [fol. 237] It is possible that the State Department might help with The Guaranty Trust Company. My fear, however, is that if it takes up with The Guaranty Trust Company the disposal of the whole or part of the Russian credit on deposit with the company and the company urges that as it has property in Russia it should be allowed to retain the deposit here until the Russian situation is settled and it is ascertained whether those claiming to be in power in Russia, have confiscated such property and whether, if so, a lawful government when established will restore the property, the State Department might allow the matter to drift and The Guaranty Trust Company might consider such drifting as a virtual victory.

My personal impression is against asking the State Department to take action. You might informally discuss it and endeavor to secure the views of the Department. If you can secure their views I will be very glad to talk over the situation with you. If you prefer I will discuss the situation with you before you speak to the State Department.

JPM-KM.

Yours very truly, —— ——.

[fol. 238] EXHIBIT "11", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

Financial Attache to the Russian Embassy

New York, July 14th, 1919.

1-4070.

J. P. Murray, Esq., Coudert Bros., 2 Rector Street, New York City.

MY DEAR MR. MURRAY:

I beg to express my sincere thanks for the thorough and exhausting analysis of the subject "de facto Government," as given in your letter of July 8th.

It is utterly useless to raise this subject with Mr. F. Polk, as the result of all conversations with him always pointed toward an appeal to the Supreme Court which in my mind is to be avoided at all for the time being.

Therefore all efforts have to be now mainly concentrated upon Mr. Sabin and his conversion to our views.

My letter to you was based solely upon the supposition that there could be given an interpretation to the "de facto Government" idea, which would enable us to take action through the State Department.

But since having heard from you I see that this is quite impossible.

Thanking you again, I am, my dear Mr. Murray.

Yours very truly, (Signed) S. Ughet, Russian Financial Attache.

JJ:LM.

[fol. 239] EXHIBIT "12", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

Russian Embassy, Washington

September 12, 1921.

MY DEAR MR. MURRAY:

You remember the $5,000,000 of Russian Governmental funds held by the Guarantee Trust Company of New York

and which we some years ago so unsuccessfully endeavored to release.

The famine in Russia and my desire to assist by all means possible the relief of the sufferings has compelled the Embassy to approach again the question of the funds with the Guarantee Trust Company. No formal steps have been taken in this matter, and will not be until we ascertain through informal negotiation the possibility of a satisfactory solution. Some hope lies in the fact that the present senior partner of the firm of Stetson and Jennings, Mr. Allen Wardwell, is deeply interested, personally, in Russian relief and sympathizes thoroughly with the endeavors of alleviating the plight of the Russian people. Mr. Wardwell has been approached through indirect channels and has shown a disposition to consider the matter. It is therefore desirable that you get in touch with Mr. Wardwell in order to ascertain more thoroughly how matters stand. Mr. Wardwell knows of my writing to you and would like to obtain from you an opinion as to the legal feature of the affair. You will understand that this is but an information discussion precursory to any eventual action.

Yours sincerely, (Signed) B. Bakhmeteff.

Mr. J. P. Murray, 2 Rector Street, New York City.

[fol. 240] EXHIBIT "13", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

September 14, 1921.

Honorable B. A. Bakhmeteff, Russian Embassy, Washington, D. C.

Re Guaranty Trust Company

DEAR MR. AMBASSADOR:

I have your letter of the 12th. Do you see any reason why I should not delay seeing Mr. Wardwell until after the decision in the suit of the Soviet vs. The Volunteer Fleet? The situation is a little complicated by an opinion rendered yesterday in the suit of the Soviets against Cibrario.

I had thought that I had in my files a statement of the facts in regard to the $5,000,000 fund from the Guaranty

Trust Company. I doubt however, if I ever had such a statement. If I had my stenographer, who is absent, has filed it so that I cannot locate it. I am now asking Mr. Ughet's office for the full facts, so that I hope to have them by the time I hear further from you. Enclosed is copy of the opinion of Judge McAvoy in the suit of the Soviet vs. Cibrario.

Yours very truly, —— ——.

JPM:AO'H.
Enc.

[fol. 241] EXHIBIT "14", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

September 21, 1921.

Allen Wardwell, Esq., #15 Broad Street, New York City.

DEAR SIR:

Mr. Bakhmeteff has suggested that I see you in regard to Russian Funds on deposit with the Guaranty Trust Company. Will you kindly let me know when it will be convenient for you to have me call to see you?

About two years ago I saw Mr. Russell of your firm in regard to the same matter. This I mention so that if you were not aware of that fact you might refer to your file before my visit.

Yours very truly, —— ——.

JPM:AO'H.

[fol. 242] EXHIBIT "15", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

September 23, 1921.

Re Guaranty Trust Company

Honorable B. A. Bakhmeteff, Russian Embassy, Washington, D. C.

DEAR MR. AMBASSADOR:

Today I saw Mr. Wardwell and he called into the conference Mr. Polk. Mr. Wardwell had been examining the file

and had read memoranda in regard to my conference in the summer of 1919 with Mr. Russell. Both spoke in the most flattering manner of yourself and both expressed a desire to help in any possible way to secure funds for the relief of those suffering in Russia. They both agreed however, that they could not advise the Guaranty Trust Company to depart from the position heretofore taken by their own office and by the Trust Company. They found on an examination of the records that their office was of the opinion that the Trust Company should not part with the fund, especially as it appeared that it stands to lose more than the amount of the fund.

Mr. Wardwell said that he also would write you a line.

Yours very truly, —— ——.

JPM:AO'H.

[fol. 243] EXHIBIT "16", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

Financial Attache to the Russian Embassy

Suite 805-7, 342 Madison Avenue

New York, October 8, 1921.

In re Guaranty Trust Company

MY DEAR MR. MURRAY:

Reverting to the latest conversations on the subject, I beg to say that two days ago the Russian Ambassador requested me to supply him not later than Monday next with a brief memorandum resuming the whole question.

I succeeded in getting such a memorandum ready now and while forwarding same to Washington wish to hand you a copy for your files, and as desired by Mr. Bakhmeteff, I shall very much appreciate if you will kindly have same considered and advise me if you have any remarks or suggestions to make relating thereto.

In regard to the conclusive part of the paper dealing with the subject of guarantees I should like to state that

the same was suggested by me in order so to say to force the issue.

I am, Dear sir,

Very truly yours, (Signed) D. Pertzoff.

Mr. J. P. Murray, Coudert Brothers, 2 Rector Street, New York, N. Y.

JDJ/D.

P. S.—Copies of letters mentioned in the memorandum have been handed to you by me personally. D. P.

[fol. 244] EXHIBIT "17", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

Financial Attache to the Russian Embassy

Suite 805-7, 342 Madison Avenue

New York, October 14th, 1921.

2175.

DEAR MR. MURRAY:

Re Guaranty Trust Co.

Kindly refer to my letter dated the 8th instant No. 2148 under cover of which I forwarded you copy of a Memorandum resuming the above question, with the request to advise me your opinion.

I did not yet hear from you and shall very much appreciate if you will kindly let me have the expression of your valuable opinion on the subject.

I am, Dear Mr. Murray,

Yours very truly, —— ——, Russian Financial Attache, by D. Pertzoff.

Mr. J. P. Murray, Coudert Brothers, 2 Rector Street, New York, N. Y.

JDJ/D.

[fol. 245] EXHIBIT "18", ANNEXED TO AFFIDAVIT OF MAHLON B. DOING

Copy

October 14, 1921.

In Re Guaranty Trust Company

D. Pertzoff, Esq., #342 Madison Avenue, New York City.

DEAR MR. PERTZOFF:

I thank you for sending me copy of your memorandum in regard to the deposit with The Guaranty Trust Company. It is my personal opinion that The Guaranty Trust Company will not release the fund unless considerable pressure is brought to bear upon it either by the Federal Government or by a judgment of a Court. I will be interested to learn of any further developments.

Yours very truly, —— ——.

JPM:KM.

[fol. 246] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DIMITRY G. TER-ASSATOUROFF

Dominion of Canada,
Province of Quebec,
City and District of Montreal, ss:

Consulate General of the United States of America:

Dimitry G. Ter-Assatouroff, being duly sworn, deposes and says that the following answers were made by deponent in the City of Montreal, in the Dominion of Canada, to questions propounded by Leon E. Spencer, Assistant United States Attorney for the Southern District of New York, and that such statements as contained in the following answers made by deponent are true.

Q. What were your associations with the Imperial Russian Government?

A. I was with the Chancellery of the Credit Operation [fol. 247] of the Russian Ministry of Finance, and I was sent by the Ministry of Finance on the 4th of January,

1917 (old style calendar, which would be the 17th day of January, 1917, our calendar), to occupy the position of Assistant Representative of the Russian Ministry of Finance in the Russian Supply Committee in New York, and subsequently I was attached to the Russian Embassy in Washington as Assistant Financial Attache.

Q. When did you receive your designation as Assistant Financial Attache in Washington, approximately?

A. Sometime in 1918, I think; on account of the Russian Revolution it was delayed, and it took place in the beginning of 1918.

Q. Prior to that time what were your associations?

A. My official position was Assistant Representative of the Russian Ministry of Finance, but as far as my work was concerned there were no changes. It was a thing which had to be done but on account of the Russian Revolution was delayed.

Q. Were you ever affiliated in Russia with the Ministry of Finance?

A. Yes. The Chancellery of the Credit Operation of the Russian Ministry of Finance, which is the special chancellery for the dealing with all the credit matters abroad as well as inside of Russia. This concerns all loans.

Q. Could you give us some of the functions of the Chancellery of Credit?

A. The principal purpose was the issuing of all the loans, all the credit operations, all the internal and external [fol. 248] loans, holding of all the funds abroad; they were always in the name of the Chancellery of Credit. They were also controlled directly by the Ministry of Finance through the Credit Chancellery.

Q. Did the Chancellery of Credit carry various deposit accounts throughout the world?

A. Yes, the Chancellery of Credit carried very large amounts abroad, which amounted before the War to something like six hundred million roubles, or three hundred million dollars.

Q. Did those deposit accounts continue all during the War?

A. During the War part of it was repatriated and part of it was spent by the Russian Government in connection with the War.

Q. Were there several accounts outstanding as late as 1919?

A. By 1919 the two places where there were funds were in London and New York.

Q. Other than those two places you don't know?

A. Yes, but at that time they were not at the disposal of the Government in St. Petersburg because in 1919 there was the Bolshevist Government which was not recognized, but still officially there were.

Q. How were withdrawals made from these accounts?

A. The withdrawals were made on the signature of two of the officials of the Russian Chancellery of Credit. Of course the cables were always confirmed by those official letters.

Q. Do you mean to say that two individuals in the Chancellery of Credit had the right to withdraw funds from any [fol. 249] of the deposit accounts?

A. Yes.

Q. These same two individuals had the same power over each and every account which the Chancellery of Credit had?

A. Yes, all; as far as I remember, all; there was no exception of the accounts of the Chancellery of Credit.

Q. Do you remember the names of those two people?

A. It was not two people in particular. There may have been at least fifteen; any two of those fifteen. The signatures of those were sent to the banks which were holding those amounts, because they were the people who had something to do with those accounts. They were in charge of those particular accounts. It was a formality. At that time nobody foresaw the possibility of any trouble with respect to those accounts.

Q. Were any of these fifteen people, as far as you know, ever in the United States?

A. Yes, there were several who were in the United States. The first persons who were sent to America in 1915, were myself and a Mr. Pehmeller. After that there were several others who were sent for temporary missions as, for instance, Mr. Gauger, Mr. Borzakowsky.

Q. Did you have the right to act as one of those two individuals entitled to withdraw from the deposit accounts?

A. No, I was never in that particular branch. My name was not on the list. Nor Mr. Serge Ughet's. He was my chief in the United States.

Q. Do you know whether Mr. Boris Bakhmeteff had the [fol. 250] power to withdraw any funds?

A. No, Mr. Bakhmeteff had nothing to do with the Ministry of Finance.

Q. Can you tell just how these withdrawals would be made? In other words, were checks drawn against the several accounts?

A. No, usually all these withdrawals were made by wire or by cable. That was the official procedure and they were afterwards confirmed by letter.

Q. That was true in respect of the Guaranty Trust Company?

A. Yes. Of course, before the War we did not have funds in America, only maybe a few hundreds or thousand dollars, an insignificant amount. Most of our funds were in Berlin and Paris because all those funds were there in order to pay the interest on the Russian loans abroad so that when the time arrived, the Russian Government would not be at the disposal of the exchange in order to be independent and be able to pay all its interest and that is why the majority of funds were kept in Berlin and Paris as we had the largest amount of Russian loans there.

Q. These restrictions under which the deposits were made at the various banks, inclusive of the Guaranty Trust Company, I suppose, were in the form of written communications with the Guaranty Trust Company?

A. Yes, they were in the form of a written communication, a cable to be sent, and after, a letter to follow.

Q. And the same instructions approximately applied to all deposit accounts?

A. Yes.

Q. There was no unusual account, was there?

[fol. 251] A. There were different accounts where we had a "pre-avis" because we had to warn the banks in advance of a big withdrawal.

Q. Did you make it your business to keep more or less in close touch with these accounts in America while you were here?

A. Yes. It was my duty at that time to keep in close touch with all of these accounts.

Q. Did you ever have any communication with the Chancellery of Credit in Russia with respect to these accounts?

A. Yes.

Q. Did you confer or communicate with the Chancellery of Credit in Russia concerning the Guaranty Trust account?

A. Do you mean myself, or my office? Yes, my office communicated on a number of occasions.

Q. What was the general nature of your communications?

A. As far as I remember, it must have been in connection with placing a certain amount of funds or the withdrawal of a certain amount from these accounts.

Q. In other words, if you wanted to withdraw for any purpose a portion of these accounts you would communicate with the Chancellery of Credit for authority?

A. No, it is not exactly like that, because all the accounts which were in the United States in the National City Bank or the Guaranty Trust, they were not put at the disposal of the Russian Embassy, so we had to communicate; they were more or less technicalities because we didn't have the slightest right; because if there were any payments to be made they had to be paid from St. Petersburg. There [fol. 252] was only one account in the National City Bank which was put in the name of Serge Ughet, Russian Financial Attache. That was on account of the Russian Supply Committee, and was put in that name in order to give it diplomatic immunity. Mr. Ughet, in whose name the account was, had not the disposition of this account but got the special permission for each payment from St. Petersburg, Russia.

Q. Who would decide whether any withdrawals would be made from these various accounts, inclusive of the Guaranty Trust Company?

A. It would be the Minister of Finance or one of his assistants in St. Petersburg.

Q. Who would initiate it?

A. It might have been initiated by our office in New York because we were in close touch with the payments which were due on different contracts, then we communicated that and got the authority to make those payments.

Q. Did you have anything to do with the opening of the deposit account with the Guaranty Trust Company in July, 1916?

A. No, it was opened before I arrived in the United States. This account was opened in 1916 in connection with a loan made by a group of banks to the Russian Government.

Q. As you said, you never attempted to exercise any control over the account?

A. No, while I was in New York I had all of those accounts under my supervision. I mean the amounts of these accounts were known to me, all the payments; all were passing through in a routine way through my hands.

[fol. 253] Q. I suppose that the Guaranty Trust Company gave monthly statements of the balances of these accounts?

A. Yes.

Q. Did they send these statements direct to Russia or did they send them to you direct to be forwarded?

A. I can't recall the statements of the Guaranty Trust Company, whether they were sent directly to Russia or maybe a copy to us and the other one to St. Petersburg; but I don't remember from the Guaranty Trust. I know from the National City Bank we got the statements. One of the reasons why I don't recall so well was that since I arrived in New York there were practically no changes in that account and it was not an active account, while the National City account was continuously active.

Q. Do you have any recollection as to why this account was opened with the Guaranty Trust Company.

A. This account was opened in connection with a loan which was made by a group of banks.

Q. Yes, but why should they pick the Guaranty Trust rather than some other bank, and for what purpose?

A. General purpose, yes, but they picked the Guaranty Trust, the National City Bank, Lee Higginson Company, the First National Bank, and J. P. Morgan, because it was the group of banks which loaned us that money, and naturally we left the deposits in these banks.

Q. The selection of the Guaranty Trust was made by the Chancellery of Credit?

A. Yes, by the Chancellery of Credit which inaugurated that loan.

[fol. 254] Q. Did you ever receive any request from the Chancellery of Credit in St. Petersburg to ascertain any facts or information with respect to the account in the Guaranty Trust Company?

A. Not that I recall.

Q. What I am driving at is this. Suppose the Chancellery of Credit in St. Petersburg wanted certain information in New York relative to the account, would they communicate directly with the Guaranty Trust Company?

A. Yes, they communicated directly, but they might also have communicated with us asking us to get the information.

Q. But the general policy was for the Chancellery of Credit to exercise direct control over the accounts.

A. Yes.

Q. They never authorized anyone in the Embassy to withdraw?

A. No, not even Mr. Bakhmeteff had authority to withdraw funds.

Q. Are you aware of any other deposits made with the Guaranty Trust Company in this account other than the twenty-five million dollar deposit?

A. Not that I remember. Maybe there were some other small ones, I have the impression that there were. I think that the Ministry of Railways had an account. I have an impression that this was so.

Q. Have you any recollection as to what the balance was in this deposit account with the Guaranty Trust in December of 1917?

A. Yes, I remember approximately. It must have been $4,976,000. Am I right? I remember it was a little below $5,000,000. Of course, it is quite a long time ago to remem- [fol. 255] ber exactly. But I remember for one particular reason, that I was averse to the policy of our Embassy of using the funds which were in the National City Bank and the Guaranty Trust Company the way they were used.

Q. But that leads into a thoroughly interesting field. I thought you said, I may have misunderstood you, that the Embassy had no control over the funds of the Guaranty Trust and National City Bank?

A. They didn't have any control, but when the Bolshevik Revolution happened, the Embassy got hold of those funds with the approval of the American Government. They asked the National City Bank to change the name of those accounts and the National City Bank agreed and changed the names. That is why I remember because to me it seemed unbelievable. And the Guaranty Trust Company refused to change the name of the account. Mr. Sabin refused to change the names and refused to submit the account to the disposal of Mr. Bakhmeteff. That is why I remember so well this particular case.

Q. I suppose the Guaranty Trust Company took the position that the account was subject to withdrawal by officials

of the Chancellery of Credit and that the Russian Ambassador was never authorized to do so.

A. Naturally, the Guaranty Trust Company stood on a perfectly formal point of view, which was, I believe, the only point of view which a bank should take, but the National City Bank agreed.

Q. I don't know whether you are familiar at all with the [fol. 256] letter written by Mr. Sabin, Chairman of the Board of the Guaranty Trust Company on December 9, 1921, to Mr. Hughes then Secretary of State. It was stated in this letter by Mr. Sabin among other things, that the Russian Ambassador in this country never had any authority to draw on this account and never attempted to exercise any control. I suppose you would say that that would accord with your views?

A. Yes, I think Mr. Sabin made a mistake in saying that the Russian Ambassador never attempted because he attempted on many occasions to get control of those five million dollars which were in the Guaranty Trust Company.

Q. Do you recall the occasions upon which the Russian Ambassador attempted this?

A. Yes, several occasions. One was the occasion in December 1917, maybe January 1918, when Mr. Sabin wrote that letter and refused to submit the account to the control of the Russian Ambassador.

Q. Of course, you don't know what request the Russian Embassy had made of the Guaranty Trust Company?

A. Do you mean, in what shape? Well, I know that it was requested from the Guaranty Trust Company to do the same thing that the National City Bank did, otherwise attempting to change the name of the account, and after that the account would be in the name of a person.

Q. If I may suggest that, that is your conclusion, is it?

A. Well, that is my conclusion also on account of the [fol. 257] letter which was written by Mr. Sabin. The conversations at that time did not take place in my presence. Not the first conversations. This must have been around December 1917 or January 1918 when Mr. Sabin wrote the letter in which he refused to submit the account to the control of the Russian Ambassador.

Q. Do you understand that that request to change the name of the account in the Guaranty Trust was communicated on behalf of the Russian Embassy by Boris Bakhmeteff himself and by Mr. Ughet? By both?

A. Well, as far as I remember, the first request was made by Mr. Ughet.

Q. And that was about when?

A. It was December 1917 or January 1918.

Q. It is your recollection, is it, that the request was made by Mr. Ughet?

A. Yes, By Mr. Ughet, in the form of a personal call when he presented to the Guaranty Trust Company the copy of the letter addressed to the National City Bank, otherwise thinking the idea was that he would argue the Guaranty Trust into doing what the National City Bank did, and that they should do the same.

Q. You apparently have some correspondence or some notations in your papers which lead you to believe that Mr. Ughet did submit those letters to the Guaranty Trust Company?

A. Yes, it is on account of the letter of Mr. Sabin, because Mr. Sabin refers to that. As far as I remember those facts very well because at that time I was very much against it. Otherwise as a matter of routine I might have forgotten. [fol. 258] Q. Did you go with Mr. Bakhmeteff and Mr. Ughet to the Guaranty Trust Company?

A. No. After that I was on several occasions with Mr. Ughet at the Guaranty Trust when he was having conversations with them in order to have the funds released.

Q. At what time did those visits on your part take place?

A. Sometime, I would say, during 1918 or 1919.

Q. Were there a good many visits by you with Mr. Ughet?

A. There were possibly about four or five.

Q. Was there any third person on behalf of the Russian Embassy present?

A. No.

Q. At that time, you were stationed in New York?

A. Yes, in New York.

Q. I suppose you went to the main office of the Guaranty Trust?

A. Yes, at 140 Broadway, New York City.

Q. Did you have your conversations with Mr. Sabin of the Guaranty Trust?

A. Not myself, I didn't talk about that although I remember that once I went there and talked to Mr. Albert Breton and presented again that request on behalf of Mr. Ughet although as I say personally, I was doing that as a matter of discipline because it was the policy of the office

and I didn't express my views to the Guaranty Trust Company.

Q. Would you go so far as to say that it was the policy of Mr. Ughet to have you go along with him when he made these requests of the Guaranty Trust?

A. Yes, in the beginning, but knowing that my view were diametrically opposite he did not take me along again; [fol. 259] although I didn't hinder him he knew I didn't approve of that.

Q. Did I understand that you went with Mr. Ughet to the Guaranty Trust in December 1917 or January 1918?

A. Yes, around that time.

Q. Have you any recollections as to whom you saw at that time?

A. In 1918 we saw Mr. Charles Sabin.

Q. Were you acquainted with Mr. Sabin?

A. I couldn't say whether I met him before socially. I have the impression that I met Mr. Sabin before casually. I never knew him very well.

Q. You were never authorized on behalf of the Russian Embassy to discuss the account of the Guaranty Trust with anyone?

A. No, on one occasion I remember when I had to do that and present that request contrary to my personal opinion. I presented the request, got the negative answer and brought it back.

Q. The request to which you refer is to change the name of the account to follow the practice at the National City Bank?

A. Yes.

Q. Did you go to the National City Bank on the several occasions that Mr. Ughet went?

A. Yes, very often. The National City Bank carried the bulk of our accounts. I used to go very often.

Q. That was quite in line with your duties?

A. Yes, I went practically every day to the National City Bank.

Q. About what time was that?

A. In 1917, 1918 and 1919.

Q. When did you say you came over to this country?

A. I came over in that position in April 1917 to occupy [fol. 260] that particular position as Assistant Financial Attache.

Q. Just for information, can you say whether Mr. Ughet has ever held any other position than Financial Attache?

A. Mr. Ughet, before coming to New York, held a position of Assistant Representative of the Russian Ministry of Finance in London with the Russian Government Committee.

Q. Was he ever, as far as you know, Charge d'Affaires in the United States?

A. He became Charge d'Affaires in the United States at the end of 1918 and he was in that position until about July 1919. It was at the time of the Versailles Treaty when Mr. Bakhmeteff went to Paris.

Q. Insofar as you know, did the United States Government ever attempt to exercise any control over the account in the Guaranty Trust Company?

A. I have a vague recollection, which is rather vague, that at the time when the United States Government sent big funds to save Russia from the famine that the attention of the United States Government was brought to the fact that there were funds belonging to the Russian Government in the Guaranty Trust Company, but whether these recollections that I have, whether it has been taken from the papers or various conversations, I couldn't say.

Q. Did you ever speak to Mr. Polk or anyone connected with the United States State Department concerning the account with the Guaranty Trust?

[fol. 261] A. No, I didn't speak to any one in the State Department about this particular account.

Q. Did you know Mr. Polk who was formerly associated with the American State Department?

A. I couldn't say exactly because I was there several times and I met a certain number of high officials but I couldn't say exactly. I remember meeting in the Treasury Department a gentleman who was Assistant Minister of Finance, his name was Wadsworth. After, I remember meeting Mr. Norman Davis. I don't remember whether he was connected at that time with the State Department but I know that he had an office in New York on Wall Street and I took on two or three occasions the list of the payments we had to make from the National City Bank for his approval because that was the procedure and Mr. Davis approved of those payments.

Q. Did anyone associated with the Guaranty Trust Company ever say anything in your presence to give you the impression that they would be unwilling to surrender the balance of the deposit account in the event that the authorized signatures from the Chancellery of Credit were communicated to them?

A. Well that was even expressed in the letter of Mr. Sabin in the letter which we got in December 1917 or January 1918. Mr. Sabin thought that under the then circumstances in Russia he would be very doubtful whether he could honor the signatures of those two people.

Q. Other than the information which you gained from that letter you couldn't say?

A. I don't remember that much.

[fol. 262] Q. Your answer to the last two questions are wholly predicated on the letter of Mr. Sabin in December 1917 or January 1918?

A. Yes.

Q. You don't know of any demand ever having been made by any members of the Chancellery of the Guaranty Trust Company to pay the funds?

A. No, I don't.

Q. My question, of course, is with respect to this balance of $4,796,000, I was just wondering whether or not the Chancellery of Credit in St. Petersburg had ever made demand or attempted to serve demand for payment of this account.

A. I have no knowledge of facts but while I remember that there were attempts it was more or less to be expected.

Q. During the year- 1918 and 1919 I suppose you would say that you, as well as the officials of the Guaranty Trust were wholly at sea as to what would happen in Russia?

A. Yes, naturally.

Q. I suppose you would be willing to say that the reluctance of the Guaranty Trust to surrender this deposit account to the Russian Embassy was predicated upon their uncertainty concerning developments in Russia.

A. I believe so, that that was one of the reasons.

Q. Do you recollect whether or not any conversations were had between any representatives of the Russian Embassy and the Guaranty Trust Company with respect to meeting the requirement than two officials of the Chancellery of Credit sign the approval or direct the withdrawal of the balance of the four million dollars or any part

thereof? Whether there were any conversations to that effect?

A. Yes.

[fol. 263] Q. Perhaps I am a little indefinite with my question. What I would like to know is this. During 1918 and 1919 it apparently was quite evident to the Guaranty Trust Company and others that no persons were then associated with the Chancellery of Credit in Russia who could draw against this account. Now, what I want to know is whether any discussions were had by members of the staff of the Russian Embassy in the United States with the officials of the Guaranty Trust to meet this situation. In other words, to supply those two names or their equivalent?

A. Not that I remember. Not to my knowledge. Maybe Mr. Ughet had.

Q. I ask that question principally as the result of your having said that one of the reasons for the refusal of the Guaranty Trust Company to pay this account was due to the absence of the proper request for its payment?

A. Well, that was the reason which Mr. Sabin expressed and again in the same letter he said that even with those two signatures he would be reluctant to make a payment.

Q. But, of course, that was more or less of a guess on his part as to what might be done by the bank if those two signatures were presented.

A. Yes, it was not distinctly said that he would refuse to pay.

Dimitry G. Ter-Assatouroff.

Sworn to before me in the City of Montreal, in the Province of Quebec, on the 22nd day of November, 1935. Richard Ford, Consul of the United States of America. (Seal.)

[fol. 264] In United States District Court

[Title omitted]

Affidavit of Boris Brasol

State of New York,
County of New York:

Boris Brasol being duly sworn, deposes and says:

I am a consultant on Russian and foreign law, with an office at 5 Columbus Circle, Borough of Manhattan, City of New York.

I was born in Russia in 1885, and I continuously resided there until the end of May, 1916. In 1903, having graduated at the High School Division of the Imperial Law School at St. Petersburg, I matriculated in the St. Petersburg Imperial University, Department of Law, and graduated in 1908, with a degree of Bachelor of Laws. In the spring of the same year I entered into the service of the St. Petersburg Circuit Court in the capacity of a junior candidate to a judicial office. In 1909, I was admitted at the said Court to my Bar examination, or more precisely, to [fol. 265] that examination, which, if passed, entitled one to hold a judicial office, and having passed same, I was promoted to the rank of senior candidate to a judicial position. Shortly thereafter I was appointed Assistant to the Chief of the Legal Division of the Railroad Construction Department of the Ministry of Ways and Communications, which Division was charged with the duty of prosecuting and defending civil actions instituted by, and brought against, the said Department. While holding this office, I was appointed secretary of the Interdepartmental Committee which was established in conjunction with the Imperial Counsel for the settlement of certain controversies between the Russian Empire and Finland relative to railroad construction matters and the condemnation of lands in Finland. In the Autumn of 1910, I was appointed to the office of prosecuting attorney, or examining magistrate, (Untersuchungerichter or juge d'instruction) in the province of Pskov, Russia, of the St. Petersburg Court of Appeals District, and in February, 1913, in the same capacity, I was transferred to the Fourteenth Precinct of the City of St. Petersburg. In the Spring of the same year, by order of the Minister of Justice, I represented, together with three other officers of the St. Petersburg Courts, the Ministry of Justice at the All Russian Convention of the Chiefs of Police who were summoned for the purpose of redrafting certain provisions governing the functions of the Police Departments which were then within the jurisdiction of the Ministry of the Interior. In January 1914, by order of the Minister of Justice, I was appointed one of the fourteen [fol. 266] members of a Special Committee under his Chairmanship which was established in conjunction with the Ruling Senate, then the highest Court of Appeal, for the purpose of compiling a complete history of the new Court Institutions of November 20, 1864. As a member of the

said Committee I prepared a historical survey of the organization and functions of the Russian prosecuting attornies (juges d'instruction). In the Autumn of 1914, with the outbreak of the European War, I joined the Army, and while serving at the front I was appointed secretary of the Regimental Court of the First Infantry Regiment of the Imperial Guard. In 1915, following my evac-ation from the front, I was appointed military prosecuting attorney of the Fourth Precinct of the St. Petersburg Military District, and later, in the same year,—examining magistrate of the Supreme Investigative Committee under the Imperial Council which, by order of the Emperor, was instituted preparatory to the trial and subsequent conviction of the then Russian Minister of War. Having completed my work there, I was commissioned by the Imperial Government to proceed on a special mission—first to London, and later, in August 1916,—to the United States in connection with the reorganization, which then took place, of the Russian Government Supply Committee in America. Before proceeding abroad I was instructed to familiarize myself in detail with the various enactments pertaining to the Russian wartime financial policies and the methods of allocating foreign exchange for Russia's purchases abroad. In this connection I was appointed: a) Member of the Russian [fol. 267] Government Supply Committee in America; b) Representative of Russia on the Interallied Conference in New York; c) Member of the Anglo-Russian Committee, New York; d) Secretary to the President of the Russian Government Supply Committee in America, and in the latter capacity I was placed in charge of all legal matters which came within the duties of the President of the said Committee. In the Autumn of 1917, following the Soviet Revolution, I resigned all my Russian Government offices and positions, and, on January 1, 1918, I entered into the service of the United States War Trade Board. In 1919, having received an honorable discharge therefrom, I started my work as consultant on Russian law and ever since I have been working in this field. In numerous cases I have testified in the Courts of this State, in the Federal District Courts and also in the United States Court of Claims on matters relating to Russian Civil and Commercial law and the Russian Imperial and Soviet administrative system. In this connection I have been advising and am now acting as Russian Counsel for the Federal Attorney General's

compelled to make use of those governmental organs which having survived the March 1917 revolution, were functioning at the time when the Soviet revolution had taken place. In this connection, it is important to bear in mind that in some of the official Collections of Soviet Decrees and Enactments the legislative acts of both the Imperial and the Provisional Governments are not only casually referred to but even verbatim recited. Thus, on pages 355-357 of the Appendices to the Collection of Decrees and Enactments relative to the Union of Communes of the Northern Region, [fol. 280] which was compiled in the year 1919 by the People's Commissariat of Justice of that region, the Statute on the transfer of hides to the State which, on April 21, 1917, was enacted by the Provisional Government, is reprinted in full. Again, on page 367 in the same collection there appears the complete text of the "Imperially ratified Decision of the Council of Ministers on the Appointment of Government Inspectors for the Supervision of the Work of certain Commercial and Industrial Enterprises" which was enacted on March 16, 1915.

On the grounds above set forth, and on the basis of my knowledge of the Russian law, I come to the conclusion that the statement made by Mr. Karinsky in his affidavit of October 7, 1935, to the effect that there is no succession, whether in Law or in fact, between the Provincial Government and the Soviet Government is incorrect.

Boris Brasol.

Sworn to before me this 25th day of November, 1935.
(Signed) Armand Chankalian, Notary Public, New York Co.

[fol. 281] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SERGE UGHET

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Serge Ughet being duly sworn, deposes and says:

That he was duly designated and acted in the United States of America as the representative of the Ministry of

Finance in the Russian Supply Committee in New York from January 2, 1917 and in February, 1917 was attached to the Russian Embassy in Washington as Financial Attache. In his dual capacity he was familiar with the financial operations and accounts of his Government in the United States; that deponent between the dates of December 3, 1918 and August 1, 1919, was duly designated and acted as Charge d'Affaires of Russia. That the Imperial Government of Russia in July, 1916, opened on its own behalf a [fol. 282] deposit account in the name of "Section Etrangere, Ministere des Finances" of the Imperial Russian Government with the defendant Guaranty Trust Company of New York by the deposit of $25,000,000 transferred from The National City Bank; that this account was opened in accordance with written instructions from the Ministry of Finance; that such instructions permitted withdrawals from this account only upon the order of and over the signatures of two certain designated officials of the Ministry of Finance stationed in and resident in Petrograd, Russia.

That the supervision of such account was not delegated by his Government to the deponent. That in accordance with the manner of administering the account orders and transactions in connection with it were not known to him. On only one occasion (the transfer of $5,000,000 out of the American Credit to Russia from National City Bank to Guaranty Trust Company of New York in July, 1917) was any transaction in connection with the fund executed by deponent.

That the balance of said account remaining on deposit with the Guaranty Trust Company of New York on December 12, 1917 was $4,976,722.78. That no demand was ever made by deponent on the Guaranty Trust Company for the payment of the balance of $4,976,722.78, or, on information and belief, by any two officials of the Russian Ministry of Finance entitled to withdraw it.

That to deponent's knowledge the only demand which was ever made on the Guaranty Trust Company for the payment of such balance of $4,976,722.78 was made on behalf [fol. 283] of the United States of America after November 16, 1933.

That during the year 1919 deponent was carrying on negotiations with the Guaranty Trust Co. for the use of the aforementioned sum of $4,976,722.78. That in these negotiations, deponent was represented by the late Mr. Murray

Office, and I have also or am still acting in the same capacity for the following law firms: Sullivan & Cromwell; Shearman & Sterling; Cravath, Henderson & de Gersdorff; Coudert Brothers; Zabrisky, Sage, Gray & Todd; Davis Polk Wardwell Gardiner & Reed; Hunt, Hill & Betts; White & Case; Breed, Abbott & Morgan; Hornblower, Garrison & Miller. I am the author of a number of articles and several books on legal subjects, including "The Methods of Legal Investigation" (Petrograd, 1916), and "The Elements of Crime" (Oxford University Press, 1927).

[fol. 268] I have read the affidavit, in the above entitled case, of Nicholas S. Karinsky sworn to on the Seventh day of October, 1935. It appears therefrom that the deponent takes the position that the Soviet Government cannot be recognized as the successor to the Provisional Government which, on November 7, 1917, was overthrown by the Soviet revolutionary forces. Mr. Karinsky seems to base his opinion on the subject, principally upon two factual grounds: a) the fact that none of the senior officers, or Ministers, of the Provisional Government became a member of the Soviet Cabinet which assumed the name of the Soviet of People's Commissars, and b) the fact that the various Ministers of the Provisional Government were liquidated and terminated by the Soviet Government, in law as well as in fact, instead of being taken over by the Soviet authorities.

Neither of these contentions and the conclusion drawn therefrom, in my opinion, are correct.

First. While I do not deny the fact that none of the Ministers of the Provisional Government became a member of the Soviet of People's Commissars, I do maintain, however, that this fact is of no legal significance and is indicative of no legal principle underlying the Soviet administrative system. As a matter of historical record it is important to bear in mind that the Provisional Government which, in March 1917 succeeded the Imperial Government, immediately after the overthrow of the latter, formed a new Cabinet or Council of Ministers, as follows: Prince G. E. Lvoff—President of the Council of Ministers and Minister [fol. 269] of the Interior, P. N. Milukoff—Minister of Foreign Affairs, A. I. Gouchkoff—Minister of War and Navy, N. V. Nekrassoff—Minister of Ways and Communications, A. I. Konovaloff—Minister of Trade and Industry, A. A. Manouiloff—Minister of Public Education, M. I. Teres-

chenko—Minister of Finance, V. N. Lvoff—Attorney General of the Holy Synod, A. I. Shingareff—Minister of Agriculture, A. F. Kerensky—Minister of Justice and I. V. Godneff—State Controller.

The composition of the Council of Ministers of the Provisional Government, as above set forth, was officially promulgated in the Messenger of the Provisional Government, No. 1/43 and No. 2/47 for the year 1917. To my personal knowledge none of the aforesaid eleven Ministers has ever held the office of Minister under the Imperial Government, and none of the members of the Council of Ministers of the Imperial Government has become a member of the Cabinet thus formed by the Provisional Government. However, to the best of my knowledge, on this ground, it has never been maintained or contended by either Russian or foreign lawyers that there is no legal succession between the Imperial Russian Government and the Provisional Russian Government.

Second. In my opinion it is incorrect to contend, as Mr. Karinsky does in his affidavit above referred to, that with the advent of the Soviet Government all the Ministries and Government Departments of the Provisional Government were terminated in fact as well as in law. What actually happened was that on October 28, (November 9, new style) 1917, the Soviet Government, following the usual [fol. 270] practice of revolutionary governments in general, formed a new Cabinet, which, as stated above, assumed the name of the Soviet of People's Commissars. This body created, in addition to the Government Departments of the Interior, Agriculture, War and Navy, Trade and Industry, Public Education, Finance, Foreign Affairs, and Justice all of which functioned both under the Imperial and the Provisional Governments, several new Government Departments including one placed in charge of matters dealing with national minorities affairs. The decree on the establishment of the said Soviet Cabinet or Soviet of People's Commissars was promulgated on October 28, 1917, (old style) in the Gazette of the Provisional Workers' and Peasants' Government. However, thereby the Government Departments and Ministries of the Provisional Government were neither terminated nor abolished, be it in fact or in law. On the contrary, each one of the departments of the Provisional Government was permitted to continue such work as came within its former pre-Soviet

jurisdiction. As a mere illustration of this fact, I shall deal with the Ministry of Finance.

The composition or inner structure of the Ministry of Finance, both under the Imperial Government and the Provisional Government, was determined by statute, viz., sections 463,—618[1] of v. 1, p. 2, Complete Code of Laws of the Russian Empire, in that division of the said Code which deals with the institution of Ministries. Section 465 contains an enumeration of the various Central Government Departments which, in their conjunction, constituted the [fol. 271] Imperial Ministry of Finance. Among the other subdivisions of that Ministry, the Department of State Treasury, the Department of Tax Assessments, and the Credit Chancery are specifically referred to in the said section 465. On the other hand, the composition and functions of the provincial institutions of the Ministry of Finance, such, for instance as the Courts of Eschequer, and the provincial branches of the State Treasury are defined in the Statute on Provincial Institutions, articles, 1001—1121, v. II, Complete Code of Laws of the Russian Empire. Again the Charter of the State Bank and the provisions relative to the Department of the State Savings Banks which were both Government institutions functioning under the immediate control of the Minister of Finance, appear respectively in arts. 1—180 of Division IV, and 1—60 of Division V of the Credit Statute, v. XI, p. 2, Complete Code of Laws of the Russian Empire.

After the overthrow of the Provisional Government, the Soviet Government not only did not abolish the Ministry of Finance but continued to specifically refer to it by name, viz, "Ministry of Finance" in its various decrees and legislative enactments, viz, in the decree on the abolition of the State Nobility and Peasants' Land Bank, promulgated in No. 20 of the Gazette of the Workers' and Peasants' Government of November 28, (December 10, new style) 1917, also reprinted in the official Collection of Enactments and Decrees of the Workers' and Peasants' Government, December 12/25, 1917, No. 4, Sect. 56. Likewise, the term "Ministry of Finance" appears in a decree of the People's Commissar of Finance of March 25, 1918 (new style) rela- [fol. 272] tive to the Library of the employees of the said Ministry. The latter decree appears on page 508 in the official Collection of Decrees and Enactments relative to the Union of Communes of the Northern Region.

Nor is it correct that as important a branch of the Ministry of Finance as the State Bank which was established in 1894 by the Imperial Government and which continued to function under the Provisional Government, had been abolished by the Soviet authorities. On the contrary, when, pursuant to the Soviet decree of December 14/27, 1917, private joint stock commercial banks were nationalized by the Soviet Government, their assets and liabilities, by the express wording of the said enactment, were taken over by the State Bank (Collection of Enactments and Decrees of the Workers' and Peasants' Government, 1917, No. 10, Sect 150, arts. 2, 3, 4 and 5). Likewise, by virtue of the decree of the Soviet of People's Commissars of November 28,—December 10, 1917, above referred to, the liquidation of the business of the State Nobility and Peasants' Land Bank was entrusted to the State Bank. Furthermore, the fact that, not only the Central or Head office of the State Bank in Petrograd, but equally its provincial branches continued to function under the Soviet Government, is corroborated by the provisions of the decree of the Soviet of People's Commissars on the loan of 20,000,000 roubles to the Soviet of the Regional Doumas of the City of Moscow which was promulgated on November 28—December 10, 1917, in issue No. 20 of the Gazette of the Provisional Workers' and Peasants' Government, and later, on December 12/25, 1917, [fol. 273] was reprinted in the Collection of Decrees and Enactments of the Workers' and Peasants' Government, No. 4, Sect. 60. In the said decree the Moscow Branch of the State Bank is specifically referred to by name in articles 1, 2 and 4. Later, in the month of April, 1918, the State Bank was given the name of "People's Bank," but in substance it retained all functions of the former and it continued to operate until January 17, 1920, when it was abolished by decree of the Soviet of People's Commissars (Collection of Enactments & Decrees of the Workers' and Peasants' Government, 1920, No. 4/5, Sect. 25). However, by virtue of a Soviet decree of October 12, 1921, the State Bank was reestablished (Collection of Enactments and Decrees of the Workers' and Peasants' Government, 1921, No. 72, Sec. 594) and it continues to function up to the present time.

With reference to the Department of State Treasury, which likewise formed a part of the Imperial Ministry of Finance and which continued to function under the Provi-

sional Government, the fact should be borne in mind that when the Soviet Government came into power, it did not abolish the said Department. This fact is corroborated by the provisions of the decree of the People's Commissar of Finance of March 24, 1918, by virtue of which all appointments of the Chiefs of the Courts of Exchequer were vested in the said Department at the State Treasury. The decree herein mentioned appears on page 508 of the Collection of Decrees and Enactments relative to the Union of Communes of the Northern Region. Moreover, the State Treasury, as an integral part of the Soviet financial system, [fol. 274] is specifically mentioned in arts. 81, 82, 83, 84, 85 and 88 of the Constitution of the Russian Federative Soviet Republic of July 10, 1918, reference to which is made by Mr. Karinsky on page 4 of his affidavit of October 7, 1935.

Another extremely important institution of the Imperial Ministry of Finance, which survived the March revolution of 1917, as a result of which the Provisional Government was inaugurated, was the Credit Chancery, officially referred to as "The Special Credit Chancery of the Ministry of Finance." The said Credit Chancery was established on January 23, 1819, under the Imperial Regime. One of the subdivisions of the said Credit Chancery of the Ministry of Finance was its "Foreign Section" or *Section Etrangere"* which was also established under the Imperial Government in or about the year 1819. The "Foreign Section," much as the Credit Chancery itself survived the March 1917 revolution, and under the Provisional Government, pursuant to its decree of June 5, 1917 (Collection of Enactments and Decrees of the Provisional Government, 1917, No. 138, Sec. 734) the Credit Chancery was given special authority in connection with the supervision of rouble deposits abroad. Not only did the Soviet Government not abolish the said Credit Chancery, but it conferred upon it further authority in connection with the control over all foreign exchange transactions. On September 19, 1918, the People's Commis-ariat of Finance enacted a decree (Collection of Enactments and Decrees of the Workers' and Peasants' Government, 1918, No. 68, Sec. 738) by virtue of which the Credit Chancery was given special [fol. 275] powers in connection with the authorization of effecting rouble transfers abroad. Furthermore, on October 3, 1918, the Soviet People's Commissariat of Finance enacted a decree "On the Regulations of Transactions in

Foreign Currency and the Exportation of Monies Abroad" (Collection of Enactments and Decrees of the Workers' and Peasants' Government, 1918, No. 72, Sec. 781) pursuant to which the Special Credit Chancery was granted the authority to supervise and control every and each transaction relating to the transfer of roubles to accounts in foreign countries. On this point it is important to remember that the provisions of the said Soviet decree almost verbatim reproduce those of the decree of the Provisional Government of June 5, 1917 above referred to. In fact, art. 1 of the said decree of June 5, 1917, provides:

"Money transfers abroad and deposits of roubles to the accounts of individuals and institutions abroad, or their representatives in Russia, as well as the assumption of any obligations entailing the aforesaid deposits and transfers shall be interdicted unless permission therefor from the Ministry of Finance shall have been granted."

Not only did the Soviet Government retain the said regulation of the Provisional Government, but in its decree of October 3, 1918, it reiterated the said regulation in the following terms:

"*On the strength of the existing regulations* all transactions in foreign currency, deposits of roubles to the accounts of persons and institutions located abroad, or their repre- [fol. 276] sentatives in Russia, as well as the assumption of any obligations entailing such deposits and transfers abroad shall be interdicted unless permission therefor shall have been granted by the Special Credit Chancery of the People's Commissariat of Finance."

In other words, the Soviet Government, with specific reference to the Credit Chancery of the Ministry of Finance, as late as in October 1918, has almost verbatim repeated the provisions of the decree of the Provisional Government of June 5, 1917. Thus, as I have shown, the Credit Chancery which was created in conjunction with the Ministry of Finance under the Imperial Regime and which continued to operate under the regime of the Provisional Government, likewise persisted under the Soviet regime.

The same is true of the provincial Courts of Exchequer. As stated above, these organs of the Ministry of Finance were created under the Imperial Regime and their organi-

zation and functions were defined in arts. 1001-1121, v. II, Complete Code of Laws of the Russian Empire. The provisional Government substantially left the Courts of Exchequer intact. Nor were these abolished by the November 1917 Soviet revolution. As a matter of fact on August 22, 1918, the People's Commissar of Finance issued a Circular in which the financial organs of the Northern Commune were instructed to deal directly with the Courts of Exchequer in that region instead of obligating the said Courts to submit their reports to the Central financial agencies of the Com-[fol. 277] missariat of Finance in Moscow. It appears from this Circular that as late as in August 1918, the Courts of Exchequer were normally functioning under the Soviet System.

The same Circular contains also specific reference to the work of the Department of Tax Assessments which was created under the Imperial Government and is specifically mentioned among the central organs of the Imperial Ministry of Finance in art. 465, v. I, p. 1, Complete Code of Laws of the Russian Empire. The text of the Circular of the People's Commissar of Finance of August 22, 1918, appears on pages 522, 523 of the Collection of Decrees and Enactments relative to the Union of Communes of the Northern Region.

Likewise, the Department of Custom Duties and the Department of Indirect Taxation, both of which were subdivisions of the Imperial Ministry of Finance, (art. 465, v. I, p. 1, Complete Code of Laws of the Russian Empire), were not abolished by the Soviets, but, by virtue of a decree of the Soviet of People's Commissars of June 29, 1918, they were placed under the jurisdiction of the Commissariat of Trade and Industry. This decree appears on page 368 of the Appendices to the Collection of Decrees and Enactments relative to the Union of Communes of the Northern Region.

In concluding my discussion on the different organs of the Ministry of Finance, I may also mention the fact that the Department of State Savings Banks which was established under the Imperial Regime (art. 1-60, Credit Statute, v. XI, p. 2, Div. V, Complete Code of Laws of the Russian [fol. 278] Empire) continued to function under the Soviets, and, a decree of the Soviet of People's Commissars of May 2, 1918, on the strength of which 3,000 new post and telegraph offices were to be established, the Department of the State Savings Banks is specifically referred to. The

said decree has been promulgated in the official Collection of Enactments and Decrees of the Workers' and Peasants' Government (1918, No. 35, Sec. 461). To the best of my knowledge the State Savings Banks continued to operate normally throughout the years 1918, 1919 and the first half of the year 1920. On June 17, 1920, by order of the Liquidation Division of the Central Budget and Accounting Department, they were merged with other cash offices of the Soviet Government; but, on December 26, 1922, the said Savings Banks were restored (Collection of Enactments and Decrees of the Workers' and Peasants' Government, 1923, No. 1, Sect. 13), and, to the best of my understanding, they continue to operate up to the present time.

Thus far I have confined my discussion to the different organs, both Central and Provincial, of the Ministry of Finance, which under the Soviet system assumed the name of the People's Commissariat of Finance. However, it goes without saying that the survival of the pre-Soviet Government Departments under the Soviet system was not limited to the Ministry of Finance. One example will suffice to clarify this point. The organization or inner structure of the Imperial Ministry of War is defined in arts. 839-863, v. I, p. 1, Complete Code of Laws of the Russian Empire. Article 841 gives a complete enumeration of those central [fol. 279] subdivisions which, in their conjunction, constituted the Imperial Ministry of War. Among these central branches was the Chief Military Courts Department. The Provisional Government left this Department intact, while the Soviet Government, without abolishing it, merely curtailed the scope of its work, and by virtue of a Soviet decree of January 20, 1918, the first, second and fifth Divisions thereof were closed. (Collection of Enactments and Decrees of the Workers' and Peasants' Government, 1918, No. 17, Sect. 257.)

Of course, I am not attempting to deny that the Soviet revolution brought about fundamental changes in the structure of the Russian governmental apparatus, and that a number of pre-Soviet both central and local executive organs were either abolished or reorganized by the Soviet authorities. However, it is a mistake, in my opinion, to assert that, as a matter of Russian Law, the entire pre-Soviet administrative system was obliterated and swept into discard by the mere seizure of the State authority by the Soviet revolutionists. The latter, historically, were

of Coudert Brothers, and the Guaranty Trust Co. was represented by Mr. Russell of the firm of Stetson, Jennings & Russell. That deponent was informed by Mr. Murray in June, 1919 that Mr. Russell, counsel for the Guaranty Trust Co., had said that the bank could not safely pay over the sum of $4,976,722.78 on the direction of the Russian Embassy without a judgment of a court of competent jurisdiction. That Guaranty Trust Co. made inquiry of deponent through counsel whether National City Bank would guarantee deponent's signature in the event a check should be drawn by the Guaranty Trust Co. to the order of the Russian Government and deposited to the credit of the Russian Government's account with the endorsement of deponent. That at that time, Mr. Russell suggested to deponent's counsel that Guaranty Trust Co., before it could make payment, would insist that it be indemnified against the possibility of a payment of said sum to any future Russian Government.

That deponent at no time made a demand on the Guaranty Trust Co. for the payment of the balance of $4,976,722.78 and deponent verily believes that no such demand was ever made by anyone on behalf of deponent's government. One basis of deponent's knowledge in support of this belief is to be found in the letter of the defendant dated December [fol. 284] 9, 1921, by Charles H. Sabin as "Chairman of the Board" on behalf of the Guaranty Trust Co. to "Honorable Charles E. Hughes, Secretary of State, Washington, D. C." (among the defendant's moving papers) wherein it was stated: "The Russian Ambassador in this country never had authority to draw on this account and never attempted to exercise any control."

That deponent has read the affidavit of Mr. Ter Assatouroff and believes it is erroneous and has no recollection that he ever conferred with Mr. Sabin or anyone on behalf of the Guaranty Trust Co. in the presence of Mr. Ter-Assatouroff, and further, deponent states on information and belief that he never requested "Guaranty Trust Co. to place at the disposal of the Russian Embassy" the sum of $4,976,722.78. (Assatouroff affidavit dated October 7, 1935, page 5.)

That deponent in 1927 and 1928 conferred with Mr. Doing of the law firm of Coudert Brothers concerning the desirability of making a demand against and instituting an action against Guaranty Trust Company of New York for

the recovery of the aforesaid sum of $4,976,722.78. Since under the arrangements between the Russian Embassy and the United States Government any Russian Government funds undesignated for specific purposes and recovered by the said Embassy had to be applied against the interest due on Russian obligations held by the United States, the deponent conferred with officials of the State Department in Washington in order to ascertain the wishes of the United States Government in respect to instituting an action against [fol. 285] Guaranty Trust Company of New York for the recovery of the aforesaid sum. After several conferences at the State Department, to the knowledge of deponent no definite decision was reached by the State Department officials as to whether a suit then should be brought to recover the aforesaid sum.

S. Ughet.

Subscribed and sworn to before me this 27th day of November, 1935. (Signed) Armand Chankalian, Notary Public, New York Co.

[fol. 286] IN UNITED STATES DISTRICT COURT

[Title omitted]

SECOND AFFIDAVIT OF SERGE UGHET

SOUTHERN DISTRICT OF NEW YORK, ss:

Serge Ughet, being duly sworn, deposes and says:

1. That annexed hereto are true copies of:

(a) Letter dated February 14, 1921 from deponent to Hon. N. Kelley, Assistant Secretary of the United States Treasury Department.

(b) Letter dated March 1, 1921 from N. Kelley to deponent.

(c) Letter dated March 4, 1921 from deponent to N. Kelley.

2. That after the exchange of letters referred to above between deponent and N. Kelley, the deponent in his rela-

tion with the Treasury Department of the United States [fol. 287] and with the State Department of the United States acted in accordance with the understanding expressed in such letters and those departments in their dealings with the deponent acted in accordance with the understanding expressed in such letters.

S. Ughet.

Sworn to before me this 12th day of December, 1935.
(Signed) Armand Chankalian, Notary Public, New York Co.

[fol. 288] EXHIBIT, ANNEXED TO AFFIDAVIT OF SERGE UGHET

Financial Attache to the Russian Embassy

New York, February 14th, 1921.

MY DEAR MR. KELLEY:

After the bolshevist upheaval in Russia, by a special arrangement of Hon. B. A. Bakhmeteff, Ambassador Extraordinary and Plenipotentiary of Russia, and the Department of State and the Treasury Department, a special set of accounts was established with the National City Bank, all the amounts on which were placed under the control of the Russian Ambassador, but payments out of which, in accordance with 4 classes, had to be made only if no objection was made by the Treasury Department against such payments. The main purpose of the establishing of such a procedure was to liquidate, in the measure of possibility, all the outstanding liabilities of Russia in the United States, in accordance with the list of contracts submitted to the United States Government at that time.

With reference to this arrangement between the Russian Ambassador and the Federal Government and to the letter addressed to Hon. R. C. Leffingwell by the Russian Ambassador on December 27th, 1917, as well as to my letter of December 29th, File No. 3733, I beg to inform you that now the liquidation of the outstanding liabilities of Russia in regard to the contracts placed in the United States is practically finished, and in view of the above, it seems to me, it [fol. 289] is opportune now to close the so-called "Liquidation Accounts" with the National City Bank, which, by my arrangement with you of last year, were merged into one

account "C", the balance of which up to date is of $21,846.70.

In case of the consent of the Treasury Department to close the above mentioned Account "C", and in accordance with the understanding established in the Fall of 1917, I propose that the balance of said Account "C" would be applied to a partial redemption of the Russian indebtedness on account of the interest due on the Russian obligations held by the United States.

Besides the Account "C", there will temporarily remain several accounts with the National City Bank, a list of which is herewith attached, guaranteeing the transfer and savings operations of the Russian Consuls in the United States, which accounts represent the credit balances of the account "Section Etrangere du Ministere des Finances No. 2", which was a part of the accounts set aside for specific purposes. As you are aware, the intention of the Russian Embassy is to establish a certain Trust Fund for the benefit of those people, whose money, having been transferred to Russia, did not reach its destination, thanks to the bolshevist upheaval.

For the future I propose to establish the following procedure.

In case any part of the Russian inventory now on hand in the United States, a list of which will be forwarded to you shortly, which previously was under the ruling of the liquidation arrangement of the Fall of 1917, would be disposed of, [fol. 290] then the amount received will have to be applied by us to the redemption of the interest on account of the American credit.

If the amount received will be less than $10,000, then we shall accumulate the amounts until the sum will reach ten or more thousand dollars, and then shall forward our check to the Treasury Department. To the same "accumulating fund" will have to be added the interest on the "Account C", up to the date of its closing, if you will agree to this, as well as the interest on the accounts guaranteeing the transfer and savings operations, up to the time when the balances of these accounts will be turned over to some Trust Fund.

If this proposal of mine meets with your approval I shall be extremely obliged to you if you will kindly let me know accordingly, and then I shall not fail to send you at once

the check in the amount of the balance of the Account "C" on the date of its closing.

I am, my dear, Mr. Kelley,

Yours very truly, S. Ughet, Russian Financial Attache.

Hon. N. Kelley, Assistant Secretary, U. S. Treasury Depart, Washington, D. C.

SU:LM.

[fol. 291] Balances

Under Accounts Guaranteeing Transfer and Savings Operations of the Russian Consulates in the U. S. A.

As of January 31, 1921

Account	"O #1" (New York)	$24,322.18
"	"P #1" (Chicago)	56,724.80
"	"P #2" "	74,195.05
"	"R #1" (Pittsburgh)	43,493.73
"	"R #2" "	312.55
"	"S #1" (San Francisco)	4,814.72
"	"S #2" "	1,679.53
	Total	$205,542.56

Exhibit, Annexed to Affidavit of Serge Ughet

March 1, 1921.

DEAR MR. UGHET:

Your letter of February 14, 1921, (No. 413) has been received. I note that the liquidation of the outstanding liabilities of the Provisional Government of Russia in regard to contracts placed in the United States has been completed, and that there is a balance of $21,846.70 with the National City Bank of New York in the Russian account from which payments are made only in the absence of objection on the [fol. 292] part of the United States Treasury. The Treasury does not object to the closing out of the account on the understanding that the above-mentioned balance is to be applied on account of interest due on Russian obligations held by the United States, and on the further understanding that, in accordance with the procedure mentioned in your letter, if further sums are received by the Russian represent-

atives in this country which would, prior to the closing out of the above-mentioned account have been payable into that account, they shall likewise be applied on interest due on the above-mentioned obligations. It is understood also that of the sum of $205,542.56 mentioned in the statement enclosed with your letter, any balance not required for the purpose for which said fund was originally set aside shall likewise be applied upon such interest. Please pay the above-mentioned sum of $21,846.70 and such further sums as may hereafter be collected or as may remain from the fund of $205,542.56 to the Federal Reserve Bank of New York by check drawn to the order of "Federal Reserve Bank of New York for credit of the General Account of the Treasury of the United States."

I am, my Dear Mr. Ughet,

Very truly yours, (Signed) E. Kelley.

S. Ughet, Esq., Russian Financial Attache, 404 Fourth Avenue, New York, N. Y.

EK:MO

[fol. 293] Exhibit, Annexed to Affidavit of Serge Ughet

Financial Attache to the Russian Embassy
404 Fourth Avenue

New York, March 4th, 1921.

My Dear Mr. Kelley:

I beg to acknowledge receipt of your letter dated March 1st in which a reply is made to my letter of February 14th, File 413.

From your reply I see that you do not object to the closing out of the Liquidation Account with the National City Bank on the understanding that the balance of said account is to be applied on account of interest due on Russian Obligations held by the United States, and on the further understanding that in accordance with the procedure mentioned in my letter if further sums are received by us, which would, prior to the closing out of the above-mentioned account have been payable into that account, they shall likewise be applied on interest due on the above-mentioned obligations.

It is understood also that of the sum of $205,542.56 mentioned in the statement enclosed with my letter, any balance not required for the purpose for which said fund was originally set aside, shall likewise be applied upon such interest.

In accordance with the above understanding I beg to inform you that today I have forwarded my check for $70,426.34 to the Federal Reserve Bank of New York, drawn to the order of "Federal Reserve Bank of New York for [fol. 294] Credit of the General Account of the Treasurer of the United States", which amount constitutes the balance of Account "C" on today's date (March 4th, 1921).

About the closing of the Account "C" I am notifying simultaneously the National City Bank of New York.

In the way to complete our full accounting to the Treasury I beg to send herewith enclosed the Schedule of all expenditures made from December 15th, 1920 up to March 4th, 1921, as well as Statement of Receipts from December 1, 1920 to March 4th, 1921.

Yours very truly, S. Ughet, Russian Financial Attache.

Hon. N. Kelley, Assistant Secretary, U. S. Treasury Department, Washington, D. C.

Enclosure.
SU/D.

[fol. 295] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HENRY MUNROE

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Henry Munroe, being duly sworn, deposes and says that from March 30, 1934 to October 31, 1935, he was an attorney in the office of the General Counsel, Treasury Department, United States Government, and that since November 1, 1935 has been a Special Attorney in the Department of Justice, United States Government. In connection with his duties in these positions, he has had frequent conferences with the Division of Eastern European affairs, De-

partment of State, United States Government in reference to the above action. During one of these conferences, he saw in the Department of State the original of a letter from Frank L. Polk to DeWitt C. Poole, Jr., dated December 9, 1921, a copy of which is annexed hereto. This letter is on the letterhead of Stetson, Jennings & Russell, attorneys and counsellors at law, Mills Building, 15 Broad Street, New York.

[fol. 296] Deponent has been informed and believes that the firm of Stetson, Jennings & Russell was in December, 1921 acting as counsel for Guaranty Trust Company of New York, in reference to a deposit of the Russian Government on its books, and that this firm is the predecessor of the firm of Davis, Polk, Wardwell, Gardiner & Reed, which firm is acting as counsel for Guaranty Trust Company, in the above action.

Deponent has been informed and believes that DeWitt C. Poole, Jr. was in December, 1921, head of the division in the Department of State, United States Government styled "Division of Russian Affairs," which division is the predecessor of the division now styled "Division of Eastern European Affairs."

On January 16, 1936, deponent read over the telephone the text of the letter, of which a copy is attached hereto, to the Division of Eastern European Affairs, Department of State, and asked this division to verify whether the text read over the telephone corresponded with the text of the original letter, described above, which is contained in the files of the Department of State.

Deponent was informed over the telephone on January 16, 1936 that the letter, of which a copy is attached hereto, is a copy of a letter in the files of the Department of State.

Henry Munroe.

Sworn to before me this 16 day of January, 1936. (Signed) Leo Cohen, Notary Public. N. Y. Co. Clk's. No. 426, Reg. No. 6C606. Commission expires March 30, 1936.

[fol. 297] Copy MS/SS
Comp. ——.
HM:gd

Stetson, Jennings & Russell,

Attorneys and Counsellors at Law,

Mills Building, 15 Broad St.,

New York

December 7, 1921.

DeWitt C. Poole, Jr., Esq., Department of State, Washington, D. C.

My Dear Mr. Poole:

In a letter signed by the Secretary of State dated December 2, addressed to the Guaranty Trust Company, information was asked in regard to a deposit of $5,000,000 in favor of the Russian Government or some organ of the Russian Government. The letter was answered by Mr. Booth, one of the Vice-Presidents, who said that I would give the information. This is a matter that really should be handled by the Chairman of the Board of Directors or the President, in view of the fact that the letter was addressed to the Trust Company, and confidentially Mr. Sabin and Mr. Potter, those two officers, regretted that Mr. Booth did not refer the matter to them. They are answering the letter fully, and you will receive a letter in a day or two. I write this merely as an explanation of the rather cautious letter written by Mr. Booth.

For your own information, this particular fund, as I [fol. 298] understand, represented a deposit by the Russian Imperial Treasury. The ambassador here never had any authority over it, nor did any of the officials in the United States so there is no one clothed with authority to dispose of this fund. The matter was carefully considered by Wardwell and myself as we were anxious if possible to secure some of this money for Russian relief, but we came to the conclusion regretfully that even if the Trust Company did not have a lien on the funds for their money taken over by the Russian Soviets, the Company would not be protected in paying out any of these funds on the order of any Russian official. However, all the information that you require will be given in the letter that the Secretary will receive tomorrow or the next day.

By-the-way, I hope that the Chinese are not going to so irritate all hands by their demands that the result will be

that the Japanese will get more than they are entitled to in Manchuria. I am not prepared to admit that they are entitled to very much.

Yours sincerely, Frank L. Polk.

[fol. 299] PLAINTIFF'S EXHIBIT 1

Ambassade de Russie, Washington, D. C.

Le 7 Avril 1917.

Monsieur le Secrétaire d' Etat,

J' ai l' Honneur d' informer Votre Excellence que Mr Serge Ughet, fonctionnaire du Ministère des Finances, a été nommé Attaché Financier à l' Ambassade de Russie, en remplacement de Mr. Grégoire Wilenkin.

Veuillez Agréer, Monsieur le Secrétaire d' Etat, l' assurance de ma haute considération.

(Signed) G. Bakhmeteff.

S. E. Mr. Robert Lansing, Secrétaire d' Etat.

April 14, 1917.

EXCELLENCY:

I have the honor to acknowledge the receipt of your note of the 7th instant and to advise you that the information contained therein, that Mr. Serge Ughet, of the Russian Ministry of Finance, has been appointed Financial Attaché to your Embassy, vice Mr. Grégoire Wilenkin, has been noted in this Department and communicated to the Treasury Department.

Accept, Excellency, the renewed assurances of my highest consideration.

Robert Lansing.

His Excellency, Mr. George Bakhméteff, Ambassador of Russia.

701.6/11/163
7 WES
Alvey A. Adee.

[fol. 300] PLAINTIFF'S EXHIBIT 2

To All Whom These Present- Shall Come, Greeting:

Know ye that I, Frank L. Polk, Acting Secretary of State of the United States of America, do hereby certify that Boris Bakhmeteff presented his letter of credence to the President of the United States and was officially received by the President as Ambassador Extraordinary and Plenipotentiary of Russia on the fifth day of July, 1917; that the said Boris Bakhmeteff has accordingly since that date been recognized by the Department of State as Ambassador of Russia; that on the third day of December, 1918, the said Boris Bakhmeteff officially informed the Department of State that he was proceeding temporarily to France and was that day turning over the affairs of the Embassy to Mr. Serge Ughet, Financial Attaché of the Russian Embassy, who would act as Chargé d' Affaires during his absence; that since the third day of December, 1918, the said Serge Ughet has been recognized by the Department of State as Chargé d' Affaires ad interim, of Russia.

In Witness Whereof I have hereunto subscribed my name and caused the Seal of the Department of State to be affixed.

Done in the City of Washington this second day of January, one thousand nine hundred and nineteen.

Frank L. Polk. (Seal of Dept. of State.)

[fol. 301] PLAINTIFF'S EXHIBIT 3

[Photostatic copy of Decree No. 63 of the People's Commissar for Foreign Affairs in Russian Language omitted from Record.]

Source: Collection of Laws and Orders of the Workers' and Peasants' Government, December 12, 1917, No. 4, Part One, Page 59, Moscow.

(Translation)

Order of the Commissar for Foreign Affairs

63. Regarding the dismissal of ambassadors, ministers and members of missions.

In view of the non-receipt of answers to the telegrams and radiotelegrams sent to ambassadors, ministers, members of missions et cetera of the Russian Republic requesting an immediate reply with respect to consenting to work under the direction of the Soviet power on the basis of the platform of the Second All-Russian Congress, they are dismissed from their posts without right to pensions and to perform any State duties whatsoever. Likewise, they are deprived as of this day of the right to make any payments whatsoever from State funds.

Envoy Extraordinary and Minister Plenipotentiary in England—Constantine Dmitrievich Nabokov.

Ambassador in Japan—Vasili Nikolaevich Krupenski.

[fol. 302] Ambassador in the United States of North America—Georgi Petrovich Bakhmeteff.

Ambassador in Italy—Mikhail Nikolaevich Giers.

Minister in China—Former Prince Nikolai Aleksandrovich Kudashev.

Ambassador in Spain—Anatoli Vasilevich Neklyudov.

Counselor of Embassy in France—Nikolai Aleksandrovich Bazili.

Consul General in Paris—Sergei Vladimirovich Zarin.

Minister in Sweden—Constantine Nikolaevich Gulkevich.

Chargé d'Affaires in France—Matvei Markovich Sevastopulo.

Chargé d' Affaires in Holland—Genrikh Genrikhovich Bach.

Chargé d' Affaires in Switzerland—Andrei Mikhailovich Onou.

Consul General in London—Alexander Mikhailovich Onou.

Counselor of Embassy in Washington—Constantine Mikhailovich Onou.

Envoy Extraordinary and Minister Plenipotentiary in Belguim—Dmitri Aleksandrovich Nelidov.

Minister in Portugal—Nikolai Sevastyanovich Etter.

Envoy Extraordinary and Minister Plenipotentiary to the United States of Brazil and to the Republics of Uruguay, Paraguay, and Chili—Alexander Ippolitovich Shcherbatski.

Minister to the Argentine Republic—Evgeni Federovich Stein.

[fol. 303] Minister to Egypt—Aleksei Aleksandrovich Smirnov.

Minister to Rumania—Stanislav Alfonsovich Paklevski-Kozell.

Consul in Canada—Sergei Aleksandrovich Likhachev.
Minister in Siam—Former Count Iosif Grigorevich Loris-Melikov.
Consul General in Korea—Yakov Yakovlevich Lyutsh.
Consul General in Barcelona—Former Prince Alexander Aleksandrovich Gagarin.
Minister in Greece—Ilim Pavlovich Demidov.
Counselor at the Embassy in Athens—Vasili Nikolaevich Strandman.
Consul General in Rome—Georgi Paramonovich Zabello.
First Secretary of the Embassy in Paris—Vladimir Mikhailovich Gorlov.
People's Commissar for Foreign Affairs—L. Trotski.

November 26, 1917.

Published in No. 20 of the Gazette of the Provisional Workers' and Peasants' Government of November 28, 1917.

[Translator's Note:] I hereby certify that the above translation is conformable with the attached original to the best of my knowledge.

(Signed) Ignatius Jawney, Principal Translator, Department of State. Appointed Translator January 1928.

[fol. 304] PLAINTIFF'S EXHIBIT 4

Telegram Received

Green & Plain

From Petrograd, Dated Dec. 4, 1917. Recd. 6th, 10.55 a. m.

Secretary of State, Washington, D. C.

2066, December 4, 9 p. m.

Your 1875, December 1, 3 p. m., received today. Have made no replies to communications designated.

No advice received from Paris but French Embassy informs me through Naval Attache of the receipt of wireless message stating that joint instructions would be sent to all Allied Missions here and added: "In accord with Japan", which I understand.

Petrograd papers today contain following:

"From New York and Washington the correspondents of the United States telegraph that the American Government

intends to hold a policy of patience with regard to the present situation in Russia striving to prove its faith in the final triumph of good sense of the democracy. According to some rumors even in the case Russia concludes an armistice the United States are prepared to recognize that which the [fol. 305] whole Russian and people recognize. In view of this it is possible that if it should be decided in the military conference in Paris to send so-called threatening communiques to Russia the American delegates will not sign them.

The position of the Washington Government is founded on the assumption that a large part of Russia does not sympathize with the aims of the Bolshevik's and more than that, their success is by no means assured. Concerning the sending of ships and munitions and other merchandise to Russia, the United States will be governed to a considerable degree by the indications of the Russian Ambassador Bakhmeteff who has already stated that he does not recognize the Government of the Bolshevik's''.

Trotsky issued an order three days ago removing all diplomats averse Soviet Government.

Francis.

[fol. 306] PLAINTIFF'S EXHIBIT 5

Telegram Received

RS.

From Petrograd. Dated June 5, 1918. Recd. 7, 3:16 a. m. Secretary of State, Washington D. C.

1, June 5, 5 p. m.

Following just received via Vologda, addressed American Ambassador: "Russian Government nominates as plenipotentiary representative in Washington Citizen Litvinov now same in Paris. Hopes friendship your Government, will not object, our purpose closer relations, intimate friendship between our peoples. Commissary Foreign Affairs, Chicherin." See my telegram of June 5, 6 p. m.

Francis.

[fol. 307] PLAINTIFF'S EXHIBIT 6

Russian Socialist Federal Soviet Republic

People's Commissariat for Foreign Affairs

Bureau of the Representative in the United States of North America

March 18th 1919.

No. 1/a

Temporary Office: New York, 299 Broadway, Room 1812

Residence: 33 Oakden Avenue, Teaneck, Hackensack, N. J.

Honorable Robert Lansing, Secretary of State, Washington, D. C.

SIR:

I have the honor to hand you herewith original credentials of my appointment as representative of the Russian Socialist Federal Soviet Republic in the United States of North America, together with an English translation of the same. [fol. 308] I also have the honor to submit a Memorandum of the present political and economic conditions of Soviet Russia based upon information supplied to me by my Government, and, furthermore, I enclose a translation of the Constitution of the Russian Socialist Federal Soviet Republic.

Holding myself entirely at the disposal of the United States Government for any additional information or for any conference, official or unofficial,

I am, Sir,

Very respectfully yours,

L. Martens, Representative of the Russian Socialist Federal Soviet Republic in the United States of North America. S. Nuortava, Secretary of the Bureau. Translation.

Russian Socialist Federal Soviet Republic

People's Commissariat for Foreign Affairs

Bureau of the People's Commissar

January 2nd, 1919.

No. 9/k

Moskow, Corner of Spiridonowka and Patriarch Lane, No. 30/1

Telephone No. 4-22-96

[fol. 309] Be it known that the Russian citizen Ludwig Christian Alexander Carlovitch Martens, now living in the United States of North America, is hereby appointed Representative of the People's Commissariat for Foreign Affairs in the United States of North America.

People's Commissar for Foreign Affairs George Chicherin. Secretary of the Bureau F. Shenkin. (Seal of the Commissariat "People's Commissariat of Foreign Affairs.")

[fol. 310] PLAINTIFF'S EXHIBIT 7

Russian Embassy, Washington

June 7, 1922.

MY DEAR MR. SECRETARY:

I have the honor to forward for your information copy of a document by which I vest in Mr. S. A. Ughet, Russian Financial Attache, the custodianship and the handling of the properties of the Russian Government in this country for which I have been responsible.

I am enclosing also a copy of my letter to Coudert Brothers, Counselors at Law, 2 Rector Street, New York, concerning the legal protection of Russian rights.

I am, my dear Mr. Secretary,

Yours very sincerely, B. Bakhmeteff.

The Honorable Charles Evans Hughes, Department of State, Washington.

Enclosures.

Know all men by these presents: That I, Boris Bakh-
[fol. 311] meteff, Ambassador Extraordinary and Plenipotentiary of Russia, do hereby for and in behalf of Russia,

appoint Serge Ughet, Custodian of all its property in the United States, both real and personal, including claims and choses in action of every kind and description, giving and granting him power to reduce such property to possession; to commence suits in the name of Russia whenever in his opinion necessary; to sell all or any part of such property whenever in his opinion it may be necessary or advisable so to do, and to enter into such contracts as he may deem necessary for the care and protection of such property.

And for and in behalf of Russia I do further authorize and empower him to receive and to receipt for any and all property of Russia and to care for same; to arrange for transportation of any and all Russian property, and to settle claims which may exist in favor of as well as those which have been or may be made against Russia.

And for and in behalf of Russia I do further authorize and empower him to employ such assistants as may be necessary in the transaction of his duties hereunder; to incur and to pay all necessary expenses, and to appoint an attorney to act in his place in the event of his disability or absence.

And for and in behalf of Russia, I do further authorize and empower him to do anything and everything which may be necessary, advisable or required in the execution of the powers hereinabove set forth.

[fol. 312] In Witness Whereof, I have hereunto signed my name and caused the seal of the Russian Embassy to be affixed this 7th day of June, 1922.

(Signed) Boris A. Bakhmeteff, Ambassador E. and P. of Russia.

June 7, 1922.

Coudert Brothers, Counsellors at Law, 2 Rector Street, New York City.

Dear Sirs:

I send you herewith copy of my letter of April 28, 1922 to the Secretary of State of the United States of America and copy of his answer of April 29.

It is my desire that you should continue to act for Russia in the future as you have in the past and that you should commence such legal suits and take such legal measures as may be necessary for the preservation and protection of her rights.

Mr. Ughet will continue as Financial Attache and act as Custodian of all Russian National property. Kindly assist him as heretofore and consult with him in regard to such legal measures as you think may be necessary or advisable.

If at any time Russia should be without any representative, kindly accept this letter as your authority to commence suits and to take such legal measures as to you may seem necessary or advisable for the preservation and protection of Russian National rights and interests.

Very truly yours, (Signed) B. Bakhmeteff, Ambassador E. and P. of Russia.

Enclosures.

[fol. 313] June 9, 1922.

MY DEAR MR. AMBASSADOR:

I am directed by the Secretary to acknowledge the receipt of your note of June 7, 1922, enclosing for the information of the Department copies of a Power of Attorney to Mr. Serge Ughet and of a letter which you have addressed to Coudert Brothers.

I am, my dear Mr. Bakhmeteff,

Very sincerely yours, D. C. Poole.

His Excellency, Mr. Boris Bakhmeteff, Ambassador of Russia.

DCP:LSS
R.
Noted Alvey A. Adee, June 9, 1922.

[fol. 314] PLAINTIFF'S EXHIBIT 8

S. Ughet, Russian Financial Attaché,
17 East 45th Street

New York, October 21, 1933.

DEAR MR. KELLEY:

The correspondence between the President of the United States and Mr. Kalinin, President of the All Union Central Executive Committee, leads me to believe that conditions may arise in the near future, where no further useful purpose can be served by my continuing to exercise the duties

with which I was vested under the exchange of notes between the Russian Ambassador and the Secretary of State of April 28 and 29, 1922.

In consequence of this belief, may I not request that my present status be discontinued at the earliest convenience of the Department of State. As to certain matters of a continuing character requiring further attention, I would respectfully suggest that after the date of the discontinuance of my status they be considered as being temporarily taken under the care of the United States Government.

In terminating my official activities, I deem it a paramount duty to express my deep appreciation for the unfailing consideration with which I have been treated at the Department of State. Permit me also to say that if a moral satisfaction has been derived by me during the trying years of my service, it has been due mainly to the cognizance that I have enjoyed the confidence of the Government of the United States.

Very sincerely yours, (Signed) S. Ughet, Russian Financial Attache.

[fol. 315] Hon. Robert F. Kelley, Chief, Division of Eastern European Affairs, Department of State, Washington, D. C.

November 16, 1933.

My Dear Mr. Ughet:

I desire to refer to your letter of October 21, 1933, in which you expressed the belief that conditions would arise in the near future when no further useful purpose would be served by your continuing to exercise the duties with which you were charged under the exchange of notes between the Russian Ambassador and the Secretary of State of April 28—29, 1922, and requested that your present status be discontinued at the earliest convenience of the Department of State.

In view of the recognition of the Union of Soviet Socialist Republics by the Government of the United States, I have to inform you that upon this date the Government of the United States ceases to recognize you as Russian Financial Attaché.

The Department is deeply appreciative of the able manner in which you have discharged the duties which devolved upon you under the exchange of notes referred to

above and of the friendly spirit with which you have for so many years cooperated with this Government.

I should like to take the occasion to extend to you personally my cordial good wishes for your future happiness and success.

Very sincerely yours, William Phillips, Acting Secretary of State.

Mr. Serge Ughet, 17 East Forty-fifth Street, New York City.

RFK:EBS.
EE.

[fol. 316] PLAINTIFF'S EXHIBIT 9

January 29, 1918.

Personal

DEAR CHARLIE:

I must apologize for writing you in a personal way about a more or less government matter, but what I would like to have for obvious reasons is a statement as to how the funds that you now have on deposit for the Russian accounts came into your possession, and what the instructions were. If you have any objection to giving this information, do not hesitate to say so. I would like this information, as it may be of assistance in cleaning up some of our Russian difficulties.

Yours sincerely, —— ——.

Charles H. Sabin, Esquire, Guaranty Trust Company, 140 Broadway, New York City.

[fol. 317] (Letterhead of Guaranty Trust Company of New York)

January 31st, 1918.

Honorable Frank L. Polk, Counsellor for the State Department, Washington, D. C.

DEAR FRANK:

I beg to acknowledge the receipt of your letter of the 19th instant. The account which this company has with the Russian Government was originally opened in July, 1916, by the deposit with us by the National City Bank of $25,000,000.

This was done in accordance with instructions from Section Estrangere, Ministere des Finances of the Russian Government, and we received directions from Petrograd to credit this amount to the Section Estrangere, payments to be made only upon the order of two of certain designated officials of the Ministere des Finances.

There is a balance of $4,984,902.73 now standing to the credit of the Ministere des Finances, Section Estrangere.

It was customary for us to honor cabled instructions with test word from the Ministere des Finances directing payments out of this account. In each instance, these cabled instructions were confirmed by proper written orders. I enclose copy of letter which I wrote to Mr. Ughet, Russian Financial Attache, dated December 12, 1917, copy of which I forwarded to you on that date.

[fol. 318] We have never been authorized to honor checks drawn on this account by Russian officials in this country.

I want you to realize that, far from having any objection to giving you information of this character, we are only too glad to be of any assistance whatever in matters of this kind.

Sincerely yours, (Signed) Charles H. Sabin, Pr.

CHS/H.

Copy

December 12, 1917.

Mr. H. Ughet, Russian Financial Attache, Flatiron Building, New York City.

Dear Sir:

We beg to refer to a copy of a letter which you have left with us dated November 28, 1917, addressed to The National City Bank of New York by His Excellency the Ambassador of the Provisional Government of Russia, in respect to the disposition of all moneys now standing at his disposal and all moneys which he may hereafter deposit.

There are no moneys deposited with this Company standing at the disposal of His Excellency. Of course, any money [fol. 319] which His Excellency may hereafter deposit with us will be subject to his instructions, or those of his duly constituted successor.

We have, however, an account, in which there is a balance of $4,976,722.78, standing to the credit of the Ministry

of Finance, Section Etrangere. This was opened in July, 1916, and moneys in this account may be paid out only upon the signatures of two of certain designated officials of the Ministry of Finance.

It has been customary for us to honor cable instructions directing payments out of this account, which cable instructions have in each case been confirmed by proper written orders. Under present conditions, we do not see how we can honor such cable instructions, nor do we see how we could honor written orders signed by the persons previously designated to draw on this account, without the assurance of our Government that such persons still have authority to act. Nor have we any authority for the transfer of these funds.

We must, therefore, for the present continue to hold these funds to the credit of such account.

Very truly yours, —— ——, President.

CHS:L.

[fol. 320] February 4, 1918.

Dear Charlie:

Very many thanks for your letter of the 31st with the very detailed information in regard to your account with the Russian Government.

Thanking you ever so much for your cordial assistance.

Yours sincerely, —— ——.

Charles H. Sabin, Esquire, Guaranty Trust Company, 140 Broadway, New York City.

[fol. 321] Plaintiff's Exhibit 10

Russian Embassy, Washington

April 9, 1918.

My Dear Mr. Polk:

At the time when during November last, funds belonging to the Russian Government were distributed for payments on different liabilities, it was considered proper to appropriate means for payment of interest on different credit operations of the Russian Government with private banking institutions approximately until June 1st, 1918.

It appears at present necessary to foresee later payments. An attached statement specifies in detail payments of interest and other current liabilities in between June 1st, 1918 and January 1st, 1919, the payments during such period totaling $3.276.718.76. Including payments due early in January 1919 the total is brought to $5,276,718.76.

As funds, at present at my disposal, are not in any way adequate to meet payments of such magnitude it is necessary to provide for other sources. In regard to this I wish to bring to your attention the account of the "Section Etrangère Ministère des Finances" with the Guaranty Trust Company of New York. This account, amounting at present to nearly five million dollars, was established in July, 1916 and has been upheld since by deposits from proceeds of different credit operations of the Russian Government in this country. The account has been in direct charge [fol. 322] of the "Foreign Department of the Russian Ministry of Finance", disbursements being effected on orders coming directly from Petrograd.

I have been given to understand that the Guaranty Trust Company would be willing to release the funds on this account provided the Company were to receive certain assurances from the Department of State, protecting such action of the Company from interference by a future lawful Government of Russia.

With regard to the above, I venture to recall that the "Section Etrangère Ministère des Finances" is the foreign operative department of the Chancery of Credit, which is in direct charge of questions pertaining to credit operations in foreign countries. It has been the special duty of this department to attend to payments of interest on foreign loans and to execute such payments. Under normal conditions there could be no doubt as to the absolute necessity of meeting payments of interest on time and in particular to the use, for such purpose, of funds on the accounts of the "Foreign Department."

Referring to the present case it is hardly possible to perceive how any future Government, recognized as lawful, could controvert the obvious legality of paying interest on direct and undisputable liabilities of its lawful predecessor to private citizens or corporations of a friendly country. The very fact of the recognition of the Government as lawful seems necessarily to imply the consideration by such Government of the validity of similar obligations.

It seems, therefore, inconceivable that the use of funds deposited to the accounts of the Foreign Department of the [fol. 323] Ministry of Finance of Russia for the former Russian Government for payment of interest on loans raised by the same Government could raise objections from any future recognized Government of Russia. For this reason it is highly improbable that complications of any character could arise from the fact of the United States Government giving the necessary assurance to the Guaranty Trust Company.

On the other hand, in case the Guaranty Trust Company's funds were released, I would undertake to have the whole amount assigned to the special purpose of meeting current payments on financial liabilities resulting from credit operations of the Russian Government in this country, removing through such assignment any possible doubts which may arise as to the justification of disposing the funds for general purposes.

Hoping that, after giving these questions consideration, you will find it possible to have the funds released and thus have assured the proper payment of interest to the holders of Russian securities in this country, I remain, my dear Mr. Polk, with highest personal regards

Yours sincerely, B. Bakhmeteff.

Honourable Frank L. Polk, Department of State.

Enclosure.

Payments of interest and other current liabilities on credit operations of the Russian Government due between [fol. 324] June the 1st. 1918 and January the 1st, 1919.

1.	25 million—5½% bonds.		
	a/ Interest due from June 1st, 1918	$687.500	
	Commission N. C. B. of New York ⅛% of the value of the coupons		859.38
	b/ Ditto	$687.500	
	December 1st, 1918.		859.38
2.	11 million 5% Treasury notes.		
	a/ Interest due November 1, 1918	$275.000	

3.	50 million credit.	
a/	Interest 6½% due July 10, 1918	$1.625.000.00
b/	Commission N. C. B. of New York ¼% of the value of the operation	
	July 10, 1918	125.000.00
	October 10, 1918	125.000.00
	Total until January 1, 1918.	$3.526.718.76
4.	January 10, 1919. Payment on the 50 million credit.	
	Interest	$1.625.000
	Commission	125.000
	Total	$5.276.718.76.

[fol. 325] PLAINTIFF'S EXHIBIT 11

Treasury Department, Washington

Assistant Secretary.

MY DEAR MR. POLK: May 9, 1918.

For your information, I am enclosing copy of letter received by Mr. Rathbone from the Division of Foreign Exchange of the Federal Reserve Board, in regard to the action which has been taken by the Guaranty Trust Company of New York in respect to the deposit accounts of the Russian Government and Russian banks. Will you stand for it?

Very sincerely yours, R. C. Leffingwell.

Honorable Frank L. Polk, Counselor for the Department of State.

Enclosure.

[fol. 326] Copy

Federal Reserve Board,
Division of Foreign Exchange,
16 Wall Street,
New York, May 7, 1918.

Mr. Albert Rathbone, Treasury Department, Washington, D. C.

DEAR SIR:

Re Russian Government Funds

Please refer to your letter of the 29th ultimo.

Mr. Albert Breton, Vice-President of the Guaranty Trust Company of New York states that some months ago, after

learning that the Russian Government had taken over all the banks, they consolidated their Government and banks accounts, and show but one balance, which is a balance due to the trust company. This disposed of the balance to the credit of the Russian Government.

You may not approve their action in merging the bank balances and Government funds but that is what the trust company advises has been done.

Very truly yours, (Signed) Penny, Assistant Director, Division of Foreign Exchange.

[fol. 327] June 5, 1918.

My Dear Mr. Leffingwell:

I have your letter of May ninth, in which you tell me that the Guaranty Trust Company has consolidated the accounts of the Russian Government and banks and shows but one balance, which is a balance due the Trust Company.

I regret that the company has taken this course, for, as you know, I have always expressed myself as being decidedly opposed to this plan when the company proposed it, and it is my recollection that the Treasury Department also opposed it.

Yours sincerely, Frank L. Polk.

The Honorable R. C. Leffingwell, Assistant Secretary of the Treasury.

861.51/321.
FLP/KB.

[fol. 328] Plaintiff's Exhibit 12

June 4, 1919.

Personal

Dear Charlie:

About a month ago, Mr. Ughet, the Russian Charge d'Affaires, told me he hoped the Russian deposits with your company could be used to pay the interest due July tenth on the Russian loan, which I understand is payable June eighteenth. He brought up the question again in a conference today, when it became evident that no other possible Russian assets in this country are available and adequate for the purpose, and that consequently if the loan is not extended by some means, Russia will default for the first time

in this country—with results that would apparently be unfavorable.

I realize that your company is both a party to the loan in question, and at the same time also in possession of the only adequate funds which if available to cover the interest, would probably avoid a default. Consequently, I have some hesitation in venturing to express an opinion. At the same time, it occurred to me that it may in fact assist you in reaching a decision to know that in my opinion it would help the general situation a great deal. Both as regards public and private interests, if you could satisfy yourself that some proper means can be devised to use these Russian funds in order to maintain Russian credit.

I would not offer an opinion at all except that, like all the questions connected with Russia, the present one is especially difficult, and were I not also confident that private [fol. 329] interests, as well as the Government, are anxious to do what they can to assist until the Russians are able to act independently and resume control of their own affairs.

I hope you will let me know what develops.

Yours sincerely, —— ——.

Charles H. Sabin, Esquire, Guaranty Trust Company, Fifth Avenue and 43rd Street, New York City.

BM/KB.

Letterhead of Guaranty Trust Company of New York

June 9, 1919.

Hon. Frank L. Polk, Counselor, Department of State, Washington, D. C.

Dear Frank:

Same as Defendant's Exhibit 4 supra, p. —.

[fol. 330] Plaintiff's Exhibit 13

Same as Defendant's Exhibits 21, 22 and 23, supra, pp. ——.

PLAINTIFF'S EXHIBIT 14

No. 1146. Moscow, U. S. S. R.

Subject: Transmittal of Documents Received from the Foreign Office Relative to the Case of Baranowsky Company v. Guaranty Trust Company of New York.

The Honorable The Secretary of State, Washington, D. C.

SIR:

With reference to my telegram No. 513 of December 5, 1935, I have the honor to enclose herewith a copy of a note [1] addressed by the Embassy under date of October 23, 1935, to the People's Commissariat for Foreign Affairs of the Union of Soviet Socialist Republics requesting copies of certain documents relating to the case of Baranowsky Company v. Guaranty Trust Company of New York, and the copies of the documents [2] handed to me by Mr. Neymann, Chief of the Third Western Political Division of the People's Commissariat for Foreign Affairs, in compliance with the Embassy's request.

[fol. 331] It will be noted that the documents given to me by Mr. Neymann are attached to my sealed certificate testifying to the source from which they were obtained.

Respectfully yours, Loy W. Henderson, Charge d'Affaires ad Interim.

Enclosures:

350.
LWH:icm.
In quintuplicate.

---

[1] Copy of note No. 327 of October 23, 1935, addressed by the American Embassy at Moscow to the People's Commissariat for Foreign Affairs of the Union of Soviet Socialist Republics.

[2] Documents (under cover of a sealed certificate) handed to Mr. Henderson by Mr. Neymann on December 8, 1935.

[fol. 332] Copy

Enclosure No. 1, to Despatch No. 1146, of Dec. 11, 1935

From the American Embassy, Moscow, U. S. S. R.

No. 327. Moscow, October 23, 1935.

To the People's Commissariat for Foreign Affairs, Moscow:

The Embassy of the United States of America presents its compliments to the People's Commissariat for Foreign Affairs of the Union of Soviet Socialist Republics and has the honor to state that the Government of the United States is seeking to recover in the American courts, under an assignment made to it by the Soviet Government on November 16, 1933, a balance of approximately $5,000,000.00 which in the latter part of 1917 stood on the books of the Guaranty Trust Company of New York to the credit of "Section Etrangère, Ministere des Finances" of the Russian Government.

It is understood that the Guaranty Trust Company plans to make a motion in the court that the suit brought by the American Government be dismissed on the ground that the Statute of Limitations had run against the claim prior to its assignment to the United States. Such a motion, it is believed, will be based upon an alleged repudiation by the Guaranty Trust Company of liability claimed to have been [fol. 333] made in 1918 and 1919 to Mr. Bakhmeteff and Mr. Ughet. It is probable that the Government of the United States will contend that such a notice of repudiation could not affect the claim of the Soviet Government to the funds in question.

The contention of the Government of the United States would be materially strengthened if it could obtain possession of copies of documents relating to an offer believed to have been made by the Guaranty Trust Company to the Soviet Government to pay that Government the sum of $1,000,000.00 in settlement of all claims by and against the Company on Russian account contingent upon a satisfactory disposition of the Baranowsky and Russo-Asiatic Bank suits. The belief that such an offer was made is based on certain statements made to the American Government in 1933 by the Guaranty Trust Company.

In the circumstances it would be deeply appreciated if the Commissariat could obtain and furnish the Embassy with copies of the documents in question for transmission to the United States. Since the motion of the Guaranty Trust

Company may be made in the month of October, the Embassy would be particularly grateful for any steps which the Commissariat may be able to take to expedite this matter.

Enclosure No. 2, to Despatch No. 1146 of Dec. 11, 1935
From the American Embassy, Moscow, U. S. S. R.

[fol. 334] UNION OF SOVIET SOCIALIST REPUBLICS,
Russian Socialist Federated Soviet Republic,
Moscow Oblast,
City of Moscow,
Embassy of the United States of America, ss:

I, Loy W. Henderson, Charge d'Affaires ad interim of the Embassy of the United States of America at Moscow, and Second Secretary of Embassy of the United States of America at Moscow, Union of Soviet Socialist Republics, do hereby certify that the attached documents were handed to me on December 8, 1935, by Mr. A. F. Neymann, Chief of the Third Western Political Division of the People's Commissariat for Foreign Affairs, with the oral statement that they are copies of originals in the possession of the Government of the Union of Soviet Socialist Republics.

I do hereby further certify that in presenting the attached documents Mr. Neymann also stated orally that he was doing so in pursuance of a request contained in a note addressed by the Embassy of the United States of America at Moscow, Union of Soviet Socialist Republics, to the People's Commissariat for Foreign Affairs of the Union of Soviet Socialist Republics, under date of October 23, 1935, which requested copies of documents in the possession of the Government of the Union of Soviet Socialist Republics relating to an offer believed to have been made by the Guaranty Trust Company of New York to pay in certain circumstances certain sums of money to the Government of the Union of Soviet Socialist Republics.

[fol. 335] In Witness Whereof I have hereunto affixed my hand and official seal this eleventh day of December, A. D., 1935.

Loy W. Henderson, Charge d'Affaires ad interim of the Embassy of the United States of America at Moscow, and Second Secretary of Embassy of the United States of America at Moscow.

Baranowski v. Guaranty Trust Company of New York

1) Carson's letter to Commissariat of Finance, dated September 2, 1931.

2) Excerpt from Memorandum attached to letter of Wardwell addressed to Rosenshein, dated October 14, 1933.

3) Huber's letter to Rosenshein, dated July 13, 1934.

4) Excerpt from Memorandum attached to letter of Carson, dated August 19, 1934.

5) Excerpt from Memorandum attached to Carson's letter dated September 5, 1934.

6) Wardwell's letter to Rosenshein, dated October 26, 1934.

7) Copy of Wardwell's Telegram to Commissariat of Finance dated about June 28, 1934.

am/4.

[fol. 336] Copy

Moscow, September 2, 1931.

Baranowsky Company v. Guaranty Trust Company of New York

Commissariat of Finance, Ilyinka 6, Moscow.

Dear Sirs:

Referring to my letter of September 1, and to my subsequent conversations with Mr. Reichel and Mr. Lubimoff, I understand from you that both questions raised in this letter will be adjusted to my entire satisfaction, and thank you for this new evidence of your willingness to co-operate.

May I take this opportunity to confirm what has already been stated to you by Mr. Wardwell and myself, namely that one of the principal defenses being interposed by us in this suit and the one which we shall use the documents being furnished by you to sustain is that the amount in dispute never belonged to Baranowsky Company, but rather at all times to the then existing Government, thru the Russian Treasury. Moreover, counsel for Guaranty Trust Company will endeavor to obtain by the New York court

recognition at least of the effect of the Soviet nationalization decrees in the form of a determination that, under the Russian law applied by that Court, Baranowsky Company no longer exists.

[fol. 337] For these reasons we have at all times felt, and I beg you will allow me to repeat, that the interests of the Soviet Government and those of Guaranty Trust Company, so far as concerns the defeat of the Baranowsky claim, entirely coincide.

As I believe you share my opinion that my departure at this time leaves a certain amount of investigation still to be done, I shall take the liberty of communicating with you on this subject from Paris after I shall have had an opportunity to study the abundance of material now being supplied me.

With renewed expressions of our gratitude for your efficient aid and of my personal pleasure in working with your staff, I am

Very sincerely yours, (Ralph M. Carson).

LES: fm c.

Excerpt from Memorandum Attached to Letter of Wardwell Addressed to Rosenshein, October 14, 1933

We confirm our conversation of Wednesday to the effect that we could enter into no agreement involving the paying over to the Soviet Government of any portion of the funds formerly standing on our books in the name of the Russo-Asiatic Bank as a consideration of any assistance or testimony which the Soviet Government might render or produce as an aid in establishing our contention that these funds are in no way the property of the Baranowsky Company.

[fol. 338] At the same time we confirm that whether or not the Soviet Government aids us in the defense of this suit, we shall be willing (provided we are successful in proving that Baranowsky has no interest in these funds) to arrive at a settlement concerning our mutual claims in connection with ruble and dollar current account balances of the Guaranty Trust Company on the one hand and the Russian Government and/or the former native Russian banks or bankers on the other hand on the following basis:

Upon our successfully defending the Baranowsky suit we will pay over to the Soviet Government forthwith 250.000

doll. and will pay over an additional 750.000 doll. either (a) when diplomatic relations shall have been established through recognition by the United States Government of the Soviet Government and upon the undertaking of the Soviet Government to reimburse the Guaranty Trust Company up to 750.000 doll. in case any subsequent litigation shall successfully establish a judgment against the Guaranty Trust Company for any of these dollar balances; or (b) upon our satisfying ourselves that further litigation is not a serious risk, whichever of the two events, i.e. either (a) or (b) arises the sooner.

We would reserve for separate settlement any liability which may arise or may have arisen out of dollar or ruble collections and out of ruble bonds held in our name by Russian banks.

It is understood that upon arriving at such a settlement the Soviet Government will lend its aid in the defense of [fol. 339] any litigation which may now or hereafter exist against the Guaranty Trust Company with respect to such dollar current account balances.

Regardless of the outcome of this negotiation we wish to express our appreciation of your cooperation in the past.

Copy

July 13, 1934.

A. J. Rosenshein, Esq., President, Amtorg Trading Company, 261 Fifth Avenue, New York City.

Dear Sir:

We refer to the proposal which we originally made to the Soviet Government by Mr. Wardwell's letter addressed to you under date of October 14th, with reference to the mutual claims between the Soviet Government and ourselves in connection with ruble and dollar current account balances of Guaranty Trust Company of New York on the one hand and the Soviet Government (including the former Russian private banks or bankers) on the other hand.

As originally stated to you, this proposal was as follows:

"Upon our successfully defending the Baranowsky suit we will pay over to the Soviet Government forthwith 250.000 dollars and will pay over an additional 750.000 doll., [fol. 340] either (a) when diplomatic relations shall have been established through recognition by the United States

Government of the Soviet Government and upon the undertaking of the Soviet Government to reimburse the Guaranty Trust Company up to 750.000 doll. in case any subsequent litigation shall successfully establish a judgment against the Guaranty Trust Company for any of those dollar balances; or (b) upon our satisfying ourselves that further litigation is not a serious risk whichever of the events, i. e. either (a) or (b) arises the sooner.

We would reserve for separate settlement any liability which may arise or may have arisen out of dollar or ruble collections and out of ruble bonds held in our name by Russian banks.

It is understood that upon arriving at such a settlement the Soviet Government will lend its aid in the defence of any litigation which may now or hereafter exist against the Guaranty Trust Company with respect to such dollar current account balances."

We herewith confirm that we are still willing to enter upon a settlement of all ruble and dollar current account balances with the Soviet Government on the foregoing basis, provided the United States Government shall in form satisfactory to our counsel release its claim upon the said dollar current account balances resulting from the correspondence between President Roosevelt and Mr. Litvinoff dated November 16, 1933.

Yours very truly, J. Paul Huber, Second Vice President.

am/4.

[fol. 341] Excerpt from Memorandum Attached to Letter of Carson

Dated August 19, 1934

Baranowsky Company v. Guaranty Trust Company

Memorandum re Witnesses in Soviet Union

This memorandum is written for the purpose of bringing unmistakably to the attention of the People's Commissariat of Finance and the People's Commissariat for Foreign Affairs the present dangerous position in the Baranowsky

case and what I consider to be the responsibility of those Commissariats and the Soviet Union for that position.

I. Nature of Case and of Proposed Testimony in Soviet Union

From the point of view of the Soviet Union, the fund involved belonged to the Soviet Union, at least prior to November 16, 1933, either by virtue of its successorship to the Imperial and Provisional Russian Governments as owners of the money or by virtue of the various Soviet decrees nationalizing Baranowsky Company and Russo-Asiatic Bank. The decree of June 28, 1918 specifically named Baranowsky Company. The New York courts have so far refused to recognize decrees of this kind as terminating the existence of the corporations involved.

[fol. 342] Excerpt from Memorandum Attached to Carson's Letters

Dated September 5, 1934

Memorandum for Supreme Court of RSFSR.

In connection with the testimony of Konstantin Rodin and N. M. Laschenko in Baranowsky Company v. Guaranty Trust Company of New York, I on behalf of Guaranty Trust Company request the Supreme Court to put to Mr. Rodin the cross-questions numbered 17-20 and to Mr. Laschenko the cross-questions numbers 52-5 In support of this request I most earnestly urge the Court to consider the following facts:

A. Nature of Case

1. ——.
2. ——.
3. ——.

The testimony of Mr. Rodin and Mr. Laschenko will be valuable in the defense of the case, it may even be decisive of the case. The facts testified to by the witnesses are in my opinion unquestionably true. For these reasons, it will be to the advantage of Guaranty Trust Company and the Soviet Union to have the testimony received and considered by the New York court, and equally it will be to the

[fol. 343] interest of Baranowsky to have the testimony stricken out and disregarded.

B. Threatened Destruction of Testimony

I. ——.

Copy

Letterhead of Davis, Polk, Wardwell, Gardiner & Reed

(Stetson Jennings & Russell)

15 Broad Street,

New York

Cable address: Stetson

October 26, 1934.

A. J. Rosenshein, Esq., President, Amtorg Trading Corporation, 261 Fifth Avenue, New York, N. Y.

My Dear Mr. Rosenshein:

I wish to confirm my statement to you this morning with regard to Guaranty Trust Company's letter to you dated July 14th, of which a copy is attached.

Recently, as you know, the United States Government has brought suit against Guaranty Trust Company in the [fol. 344] United States District Court of the Southern District of New York in respect of both the former Ministry of Finance account and the former Russo-Asiatic Bank special account (claimed by Baranowsky) on the books of Guaranty Trust Company. These suits indicate a determination by the United States to enforce its claim to these accounts in virtue of the correspondence between President Roosevelt and Mr. Litvinoff dated November 16, 1933.

In view of the position thus taken by the United States Government, and the fact that the complaints served in these actions must be answered in the very near future, I believe you understood at our meeting today, and I now confirm that from now on Guaranty Trust Company must and does feel free to make any settlement with the United States Government which it deems advantageous. If, however, the United States should, before any such settlement were made or judgment recovered in these actions, release its claims in the manner described in Guaranty

Trust Company's letter of July 14th, then Guaranty Trust Company would be willing to renew its offer of settlement to the Soviet Union with such adaptations as the then existing circumstances may require.

Very sincerely yours, Allen Wardwell.

am/4.

[fol. 345] Copy of Telegram Dated —— —, ——

Commissariat of Finance MSK USSR

New York YM4 131W 27 NIL COM NORTHERN

For Reichel Liubimov have had no reply to our cables sent by Carson of my office September twentieth and October second regarding witnesses and evidence for second trial Baranowsky case stop Case now adjourned to November ninth stop We are attempting to get further adjournment but think success unlikely stop From information at hand we think Rodin Laschenko important witnesses who should testify at trial without fail stop We are willing pay expenses of their trip New York stop Guaranty Trust Company hereby gives you formal notice that if through failure of Russian Government to cooperate in the trial of case at this time Baranowsky obtains judgment Guaranty Trust Company will consider you bound and foreclosed by judgment from any further interest in fund.

Allen Wardwell.

am/4.

[fol. 346] PLAINTIFF'S EXHIBIT 15

The Secretary of the Treasury, Washington

(Seal)

Aug. 27, 1935.

MY DEAR MR. ATTORNEY GENERAL:

In response to your informal request, in connection with the pending action against the Guaranty Trust Company of New York, I am giving you the following statement of the participation of the Treasury in the handling of Russian assets and liabilities in this country after the Russian Revolution in 1917. The statement has been prepared from the files of this Department, as supplemented by conferences with persons who were then officers of the Treasury.

In accordance with authority contained in the Liberty Bond Acts to establish credits in favor of certain foreign governments for the purpose of more effectually providing for the national security and defense and prosecuting the war the Treasury from time to time, prior to the President's proclamation of peace, made loans to allied and associated powers and received their obligations for the amounts so loaned. These amounts, together with other funds in this country belonging to such powers, were for the most part used by the borrowers for the purchase here of war supplies and materials.

During the summer and autumn of 1917, and prior to November 7, of that year, the United States made loans to the [fol. 347] Provisional Government of Russia and received the obligations of that Government in an aggregate amount of $186,400,000. After November 7, 1917, no further loans were made by the Treasury to the Russian Government save only that on November 15, 1917, there was loaned to Russia the sum of $1,329,750 against its obligation in the same sum. The entire amount so loaned was turned over by the Russian Ambassador, Mr. Bakhmeteff, to the Treasury in payment of the interest to November 15, 1917, which had accrued upon the obligations of the Russian Government held by the United States Treasury. When the Provisional Government of Russia was overthrown on or about November 7, 1917, there were outstanding, according to information obtained by the Treasury from the Russian diplomatic representatives in the United States and from other sources, contracts and other commitments of the Provisional Government of Russia for the purchase from American concerns of war supplies and materials amounting to approximately $102,000,000. At this time there were on the books of the National City Bank of New York deposit balances in substantial amounts, (partly derived from the United States Government loans to Russia), against which Boris Bakhmeteff, who had been appointed by the Provisional Government of Russia as Russian Ambassador to the United States and who was then and during the period covered by this letter so recognized by the United States Government, was authorized to draw.

From the time of the entry of the United States into the War, it was a fixed policy of the United States to aid and encourage Russian military effort against the Central

[fol. 348] Powers, in order to relieve the pressure on the Western front. Even before the Russian Revolution of 1917 American manufacturers had been reluctant to enter into contracts on the credit of the Provisional Government of Russia, and on numerous occasions the Treasury had advised such manufacturers that it had established certain credits in favor of that Government to be made available to it for approved purchases here. Similar advices were given American manufacturers by the Allies Purchasing Commission and by the War Industries Board.

The overthrow of the Provisional Government of Russia in November, 1917, necessarily created a serious problem for the United States Government in respect to Russian governmental assets and liabilities in the United States. At that time it was uncertain just what permanent government would be selected by the Russian people. It was important that Russia should continue in the war against the Central Powers, that no action be taken which would jeopardize the relations between the United States and the Russian people, that no cause be given for the repudiation of the Russian indebtedness to the United States, that nothing be done which might affect the validity of the obligations of the Russian Government held by the Treasury, and that the outstanding contracts of the Provisional Government of Russia to American contractors be settled so that their plant capacity could promptly be made available to the United States or to others of the allied and associated powers, so that war supplies called for by such contracts might be made available to the United States or to the nations at war with the Central Powers.

[fol. 349] To meet this situation Mr. Bakhmeteff, as the recognized representative of Russia, undertook, with the cooperation of the Treasury and of the War Industries Board, to liquidate the outstanding Russian contracts in this country and, to the extent that he was able to do so, to meet the obligations in this country of the Russian Government. For such purposes he agreed to use the credit balances of the Russian Government in the National City Bank and the proceeds of the inventory under his control. In accordance with this arrangement, all of the said outstanding contracts were settled by agreement,—some were performed in whole or in part and others canceled. Such settlements were arrived at largely through the good offices of the Treas-

ury and the War Industries Board. Materials delivered under such contracts were purchased from Mr. Bakhmeteff by the United States or by the allied governments to the extent that they were required by them for war purposes. Cash received by Mr. Bakhmeteff was paid by him into the Russian accounts with the National City Bank and checks drawn by Mr. Bakhmeteff or his representatives against such accounts were paid by the National City Bank if and only if the Treasury made no objection to their payment. The balances then remaining in said accounts in the National City Bank, pursuant to instructions from Mr. Bakhmeteff, were turned over to the Treasury beginning in March, 1921, to apply against the interest on the indebtedness of the Russian Government to the United States.

When it was learned that the Provisional Russian Gov- [fol. 350] ernment had some $5,000,000 on deposit with the Guaranty Trust Company of New York, inquiries were made of the Guaranty Trust Company to ascertain whether it would be willing to deal with such deposit account in a manner similar to that which the National City Bank was willing to adopt in respect of its deposit accounts in favor of the Provisional Government of Russia. The Guaranty Trust Company, however, advised that it had not been authorized by the Russian Government to honor checks drawn by Mr. Bakhmeteff against this account and made it clear that they considered themselves accountable for this deposit only to a Russian Government which might in the future be recognized by the United States. In response to later inquiries Guaranty Trust Company stated that early in 1918 it had applied the credit balance in this account as a partial offset against the greater amount claimed to be due to it from the Russian Government through the seizure of its property. At no time was there an attempt on the part of the Treasury, either directly or through Mr. Bakhmeteff, to obtain or exercise any dominion or control over this account in the Guaranty Trust Company or over any other Russian asset. No action was taken to compel the release of this deposit and no demand was made by the United States for its release until after the United States obtained an assignment of it upon the recognition of the Government of the Soviet Union in 1933.

Very truly yours, T. J. Coolidge, Acting Secretary of the Treasury.

The Honorable The Attorney General of the United States.

[fol. 351] PLAINTIFF'S EXHIBIT 16

Address Official Communications to The Secretary of State, Washington, D. C.

(Seal)

Department of State, Washington

In reply refer to EE.

November 21, 1935.

The Honorable Homer S. Cummings, Attorney General.

MY DEAR MR. ATTORNEY GENERAL:

In response to your informal request for information in connection with an action now pending against the Guaranty Trust Company of New York to recover a deposit in that bank standing in the name of the "Ministry of Finance, Section Etrangère" of the Russian Government, I wish to make the following statement with respect to the former diplomatic status in the United States of Mr. George Bakhmeteff and Mr. Boris Bakhmeteff, Ambassadors of Russia, respectively, and of Mr. Serge Ughet, Financial Attaché of the Russian Embassy in Washington.

Mr. George Bakhmeteff presented his letter of credence to the President of the United States and was officially received by him as Ambassador Extraordinary and Plenipo-
[fol. 352] tentiary of Russia on November 28, 1911. He continued to act as Ambassador of Russia until his resignation following the abdication of the Tsar and the establishment by March 16, 1917, of the Provisional Government of Russia. He informed the Secretary of State, by a communication dated April 20, 1917, that the Provisional Government of Russia had accepted his resignation.

Prior to the resignation of Mr. George Bakhmeteff, the Secretary of State was informed by him of the appointment of Mr. Serge Ughet as Financial Attaché of the Russian Embassy in Washington. There are enclosed photostatic copies, authenticated by the Secretary of State, of a communication dated April 7, 1917, from Ambassador George Bakhmeteff, informing the Secretary of State of the ap-

pointment of Mr. Ughet in the capacity indicated, and of the Department's acknowledgment thereof dated April 14, 1917.

Mr. Boris Bakhmeteff presented his letter of credence to the President of the United States and was officially received by him as Ambassador Extraordinary and Plenipotentiary of Russia on July 5, 1917. There is enclosed a photostatic copy, authenticated by the Secretary of State, of a certificate dated January 2, 1919, signed by Frank L. Polk, Acting Secretary of State, containing a statement to that effect. Mr. Bakhmeteff was appointed in the capacity indicated by the Provisional Government of Russia, which was recognized by the Government of the United States on March 22, 1917.

Mr. Serge Ughet continued to act under Ambassador Boris Bakhmeteff as Financial Attaché of the Russian Embassy.

[fol. 353] It is the understanding of this Department that, following the overthrow of the Provisional Government of Russia on November 7, 1917, its successor, the "Provisional Workers' and Peasants' Government" (later known as the Soviet Government) did not recognize Mr. Boris Bakhmeteff and Mr. Serge Ughet as its representatives. In this connection, there is enclosed herewith a photostatic copy, authenticated by the Secretary of State, of the Russian text, together with a translation thereof, of an "Order of the Commissar for Foreign Affairs," dated November 26, 1917, as contained in a publication in the files of the Department of State entitled, in translation, "Collection of Laws and Orders of the Workers' and Peasants' Government, December 12, 1917, No. 4, Part One." This order was published, according to the publication referred to, on November 28, 1917, in No. 20 of the "Gazette of the Provisional Workers' and Peasants' Government." It is understood that the last three dates mentioned above are all according to the Gregorian calendar; these dates, according to the Julian calendar, are, respectively, as follows: December 9, 1917; December 25, 1917, and December 11, 1917. It will be noted that this order dismissed the "Ambassador in the United States of North America—Georgi Petrovich Bakhmeteff." Since the resignation of Mr. George Bakhmeteff as Ambassador of Russia had been accepted by the Provisional Government of Russia, and since Mr. Boris Bakhmeteff was recognized by the United States Government as Ambassa-

dor of Russia at the time of the issuance of the order, it would appear that Mr. Georgi (George) Bakhmeteff was inadvertently named in the order because of the identity of the surnames of the two men. It may be stated [fol. 354] further in this connection that the American Ambassador to Russia, Mr. David R. Francis, informed the Secretary of State by a telegram, dated December 4, 1917, that Trotski, Commissar for Foreign Affairs, had "issued an order three days ago removing all diplomats averse Soviet Government." A photostatic copy, authenticated by the Secretary of State, of this telegram is enclosed herewith. In further evidence, in then existing circumstances, of the fact that the Soviet Government did not consider Mr. Boris Bakhmeteff as its representative in the United States, it may be stated that

(1) Ambassador Francis informed the Secretary of State by a telegram dated June 5, 1918, that he had received the following message from the Commissar for Foreign Affairs, George Chicherin:

"Russian Government nominates as plenipotentiary representative in Washington Citizen Litvinov now same in Paris. Hopes friendship your Government, will not object, our purpose closer relations, intimate friendship between our peoples."

A photostatic copy of this telegram, authenticated by the Secretary of State, is enclosed.

(2) Under date of March 18, 1919, Mr. L. Martens informed the Secretary of State by letter of his appointment as "representative of the Russian Socialist Federal Soviet Republic in the United States of North America" and enclosed a copy of a document, dated January 2, 1919, in [fol. 355] Russian, together with a translation thereof, certifying to his appointment "as Representative of the People's Commissariat for Foreign Affairs in the United States of North America." Photostatic copies of these documents, authenticated by the Secretary of State, are enclosed.

The Government of the United States did not receive in the capacities indicated above either Mr. Litvinoff or Mr. Martens. It continued to recognize Mr. Boris Bakhmeteff as Ambassador and Mr. Ughet as Financial Attaché. Mr. Bakhmeteff's status as Ambassador continued until June

30, 1922, and that of Mr. Ughet as Financial Attaché until November 16, 1933. From December 3, 1918, to July 31, 1919, Mr. Ughet was recognized by the Department of State as Chargé d' Affaires ad interim. A photostatic copy of a certificate, dated January 2, 1919, signed by Frank L. Polk, Acting Secretary of State, containing a statement that Mr. Ughet was recognized as Chargé d' Affaires ad interim by the Department of State, has been authenticated by the Secretary of State and is enclosed. There are also enclosed photostatic copies, authenticated by the Secretary of State, of the following documents:

1. A letter from Ambassador Boris Bakhmeteff, dated June 7, 1922, to the Secretary of State, transmitting a copy of a document dated June 7, 1922, signed by Ambassador Bakhmeteff, vesting in Mr. Ughet "the custodianship and the handling of the properties of the Russian Government in this country";

[fol. 356] 2. A copy of a letter "concerning the legal protection of Russian rights," dated June 7, 1922, to Coudert Brothers, Counselors at Law, from Ambassador Bakhmeteff;

3. A true copy of a letter, dated June 9, 1922, from the Secretary of State acknowledging Ambassador Bakhmeteff's letter of June 7, 1922;

4. A letter from Mr. Serge Ughet, Russian Financial Attaché, dated October 21, 1933, to the Department of State, and a true copy of the Department's reply thereto dated November 16, 1933.

One of the reasons for the continued recognition by the Government of the United States of the diplomatic status of Mr. Boris Bakhmeteff and Mr. Ughet as representatives of Russia was that there were outstanding in the United States at the time of the revolution of November 1917, contracts in substantial amounts concluded between the Russian Government and American manufacturers for war supplies and materials and that there was located in the United States a large inventory of such supplies and materials. It was considered important that there should be in this country a representative of the Russian State who might be in a position to liquidate these contracts and dispose of these materials in such a way that the interests of

American manufacturers might be protected from loss and the materials contracted for might be used for war purposes by the United States or others of the allied powers. An arrangement with this end in view was arrived at by [fol. 357] the Government of the United States with Mr. Bakhmeteff and was carried out by him and Mr. Ughet to the eminent satisfaction of the Government of the United States. Another reason for such continued recognition was that the Government of the United States was interested in the protection of the rights of American holders, including the Government of the United States, of Russian Government obligations, as is indicated in certain of the documents appended hereto.

In connection with the deposit in the Guaranty Trust Company of New York standing in the name of the "Ministry of Finance, Section Etrangère," the Department of State, apparently having in mind the interests of this country as outlined in the preceding paragraph, endeavored to ascertain from the Guaranty Trust Company the exact nature of the deposit in question. Mr. Frank L. Polk, Counselor of the Department of State, in a letter, dated January 29, 1918, to Mr. Sabin, President of the Guaranty Trust Company, stated that he would like to have "a statement as to how the funds that you have on deposit for the Russian accounts came into your possession, and what the instructions were." Photostatic copies of this letter of Mr. Polk, of Mr. Sabin's reply thereto of January 31, 1918, of the enclosure to Mr. Sabin's letter, namely, a copy of a letter to Mr. Ughet dated December 12, 1917, and of Mr. Polk's acknowledgment of February 4, 1918, of Mr. Sabin's letter to him, have been authenticated by the Acting Secretary of State and are enclosed. Subsequently, in a letter dated April 9, 1918, the Russian Ambassador, Mr. Boris Bakhmeteff, furnished Mr. Polk information as to the nature of [fol. 358] the deposit and requested that the Department of State "find it possible to have the funds released and thus have assured the proper payment of interest to the holders of Russian securities in this country." A photostatic copy, authenticated by the Secretary of State, of this letter is enclosed.

On May 9, 1918, Mr. R. C. Leffingwell, Assistant Secretary of the Treasury, addressed a letter to Mr. Frank L. Polk, Counselor of the Department of State, enclosing a

copy of a letter, dated May 7, 1918, from Mr. Penny, Assistant Director of the Division of Foreign Exchange of the Federal Reserve Board, informing the Treasury Department that the Guaranty Trust Company had consolidated the accounts of the Russian Government and banks and that there was "but one balance, which is a balance due to the trust company." Mr. Penny stated further in his letter that "this disposed of the balance to the credit of the Russian Government." Mr. Polk replied to Mr. Leffingwell by a letter, dated June 5, 1918, stating that he opposed the consolidation and that it was his "recollection that the Treasury Department also opposed it." Photostatic copies, authenticated by the Acting Secretary of State, of this correspondence are enclosed.

Under date of June 4, 1919, Mr. Polk took up with the Guaranty Trust Company by letter the question of having the "Russian deposits" released and expressed the opinion that "it would help the general situation a great deal, both as regards public and private interests, if you could satisfy yourself that some proper means can be devised to use these Russian funds in order to maintain Russian credit." Photo-
[fol. 359] static copies, authenticated by the Secretary of State, of Mr. Polk's letter of the date indicated, and of Mr. Sabin's reply thereto, dated June 9, 1919, are enclosed.

In order to ascertain "the potential assets of the Russian people in this country" the Secretary of State, Mr. Charles Evans Hughes, addressed a communication to the Guaranty Trust Company, dated December 2, 1921, requesting information with respect to a "credit of approximately $5,000,000 in favor of the Government of Russia or of some organ of the Russian Government." Photostatic copies, authenticated by the Secretary of State, of Secretary Hughes' communication of December 2, 1921, Mr. Sabin's reply thereto of December 9, 1921, and of Secretary Hughes' acknowledgment of January 17, 1922, are enclosed.

A list of the documents, mentioned above, authenticated by the Department is attached.

Sincerely yours, (Signed) Cordell Hull.

Enclosures: List of documents and documents listed therein.

[fol. 360] List of Documents, Authenticated by the Department of State, Enclosed With a Letter to the Attorney General, Dated November 21, 1935

1. A communication from Mr. George Bakhmeteff, Ambassador of Russia, dated April 7, 1917, to the Secretary of State, and a true copy of the Secretary of State's acknowledgment thereof, dated April 14, 1917.

2. A true copy of a certificate, dated January 2, 1919, signed by the Acting Secretary of State Mr. Frank L. Polk.

3. The first page of a publication bearing the title, in translation, "Collection of Decrees and Orders of the Workers' and Peasants' Government, December 12, 1917, No. 4, Part One," and page 59 of the same publication, together with a translation of decree No. 63 of the People's Commissar for Foreign Affairs, L. Trotski, printed on page 59 of the above-mentioned publication, certified by Mr. Ignatius Jawney, a translator in the Department of State.

4. A telegram from Ambassador Francis at Petrograd, dated December 4, 1917, to the Secretary of State.

5. A telegram from Ambassador Francis at Petrograd, dated June 5, 1918, to the Secretary of State.

[fol. 361] 6. A letter, dated March 18, 1919, to the Secretary of State, signed by "L. Martens, Representative of the Russian Socialist Federal Soviet Republic in the United States of North America," together with two of its enclosures, namely, a document, in Russian, certifying to the appointment of Mr. Martens as "Representative of the People's Commissariat for Foreign Affairs in the United States of North America," signed "George Chicherin, People's Commissar for Foreign Affairs," and a translation thereof.

7. A letter, dated June 7, 1922, from Mr. Boris Bakhmeteff, Ambassador of Russia, to the Secretary of State, and its two enclosures; a true copy of a letter from the Secretary of State in acknowledgment thereof, dated June 9, 1922.

8. A letter from Mr. Serge Ughet, Russian Financial Attaché, dated October 21, 1933, to the Department of State, and a true copy of the Department's reply thereto, dated November 16, 1933.

9. The record copy of a letter, dated January 29, 1918, from Mr. Frank L. Polk, Counselor of the Department of State, to Mr. Charles H. Sabin, President of the Guaranty Trust Company; Mr. Sabin's reply, dated January 31, 1918, together with its enclosure, dated December 12, 1917; and a record copy of Mr. Polk's acknowledgment, dated February 4, 1918.

[fol. 362] 10. A letter, dated April 9, 1918, from Mr. Boris Bakhmeteff, Ambassador of Russia, to Mr. Frank L. Polk, Counselor of the Department of State, and its enclosure.

11. A letter, dated May 9, 1918, from Mr. R. C. Leffingwell, Assistant Secretary of the Treasury, to Mr. Frank L. Polk, Counselor of the Department of State, together with its enclosure, dated May 7, 1918, and a true copy of Mr. Polk's reply thereto, dated June 5, 1918.

12. A record copy of a letter from Mr. Frank L. Polk, Counselor of the Department of State, dated June 4, 1919, to Mr. Charles H. Sabin, President of the Guaranty Trust Company, and Mr. Sabin's reply thereto, dated June 9, 1919.

13. A true copy of a letter from the Department of State, dated December 2, 1921, to the Guaranty Trust Company; a letter, dated December 9, 1921, from the Guaranty Trust Company in reply thereto; and a true copy of an acknowledgment by the Department of State, dated January 17, 1922.

[fol. 363] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY AFFIDAVIT OF ALBERT BRETON

STATE OF NEW YORK,
County of New York, ss:

Albert Breton, being duly sworn, says:

I am and have been since 1916 a Vice-President of the above-named defendant, Guaranty Trust Company of New York, and during the period 1917-22 I was Vice-President in charge of the Foreign Department thereof.

I am now Vice-President of Guaranty Trust Company of New York in charge of its foreign branches and have my

headquarters in Paris, France. I recently came from Paris on a temporary visit to New York.

At all relevant times I was familiar with the consolidation of accounts effected on the books of Guaranty Trust Company of New York in February 1918 whereby, among [fol. 364] other things, the account with Guaranty Trust Company of the Russian Government Ministry of Finance was closed and the former balance therein was set off against the dollar equivalent of the indebtedness owing to Guaranty Trust Company by various former Russian private banks in ruble account. I understand that in the above-entitled action the United States Government as assignee of the Russian Government is seeking to recover the said Ministry of Finance account.

I have read the affidavit of Dmitry Ter-Assatouroff herein verified October 7, 1935. I was acquainted both with Mr. Serge Ughet, the Financial Attache to the Russian Embassy, and with Mr. Ter-Assatouroff during the period mentioned in his said affidavit. I knew that Mr. Ughet was representative of the Ministry of Finance in New York, and that Mr. Ter-Assatouroff was assistant representative of the Ministry of Finance in New York. I had several conversations with Mr. Ughet and with Mr. Ter-Assatouroff during the years 1918 and 1919 and after the set-off or consolidation of accounts above described, which conversations related (among other things) to the said Ministry of Finance account. I can fix the dates of these conversations only approximately, my recollection being that they occurred at intervals between February 1918 and about June 15, 1919, the latter being the approximate date on which I left New York on a trip to Europe. On one or two of these occasions Mr. Ughet and Mr. Ter-Assatouroff together called on me in my office at Guaranty Trust Company of New York in New York, and on one or more additional occasions Mr. Ter-Assatouroff came alone. My recollec- [fol. 365] tion of the conversations at these times is in substance as stated by Mr. Ter-Assatouroff in his said affidavit verified October 7, 1935; namely that Mr. Ughet and Mr. Ter-Assatouroff or Mr. Ter-Assatouroff alone (when he came alone) asked me whether Guaranty Trust Company of New York would permit the said account to be drawn on by the Russian Government representatives in the United States. In reply to these statements, on each of the said

occasions, I said in substance that Guaranty Trust Company would not make any payment out of the account, because of Guaranty Trust Company's own claims against the Russian Government for losses due to the Soviet Government's confiscation of Guaranty Trust Company's funds in Russia.

I have also read the affidavit of Serge Ughet herein verified November 27, 1935. Mr. Ughet states therein that he has no recollection of having conferred with Mr. Sabin or anyone on behalf of Guaranty Trust Company in the presence of Mr. Ter-Assatouroff. This statement, however, does not affect my recollection which is as above stated. In so far as the statements in Mr. Ughet's said affidavit rest upon the sentence quoted therein from the letter of Mr. Sabin dated December 9, 1921, to Honorable Charles E. Hughes, as Secretary of State, I believe that Mr. Ughet incorrectly interprets that letter. It was my understanding in 1918 and 1919 that the Russian Ambassador through Mr. Ughet and Mr. Ter-Assatouroff was trying to exercise authority over the said account and to control the same, and I believe that the sentence in Mr. Sabin's letter was intended by him to refer only to the period before the Soviet Revolution. This understanding is derived both from my reading of the said letter and from conversations which I had with [fol. 366] Mr. Sabin during 1918 and 1919 with respect to the said Ministry of Finance account.

In his said affidavit Mr. Ughet mentions a statement made to him by Mr. Murray of Coudert Brothers as his attorney attributing a statement to Mr. Russell as attorney for Guaranty Trust Company of New York with reference to the drawing of a treasurer's check on the said Ministry of Finance account by Guaranty Trust in favor of the Russian Government, the endorsement of that check by Mr. Ughet, and the guarantee of such endorsement by National City Bank. To the best of my recollection no such proposal ever came to my attention at any time when I was in charge of the Foreign Department of Guaranty Trust Company or at any other time prior to my reading of Mr. Ughet's said affidavit; and I am advised by Guaranty Trust Company's counsel, and believe, that the surviving partners of Mr. Russell (now deceased) have no recollection of any such proposal and that the records of the firm contain no trace of any such proposal. It was and is my recollection, on the

contrary, that I as an officer of Guaranty Trust Company of New York informed Mr. Ughet and Mr. Ter-Assatouroff that Guaranty Trust Company would not effect any payment out of the said account.

Albert Breton.

Sworn to before me this 24th day of December, 1935. H. A. Meinken, Notary Public, Nassau County No. 2048.

[fol. 367] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY AFFIDAVIT OF J. PAUL HUBER

STATE OF NEW YORK,
County of New York, ss:

J. Paul Huber, being duly sworn, says:

I am and have been since February 1920 in the employ of the above-named defendant Guaranty Trust Company of New York, assigned to the Foreign Department thereof, and am now a Second Vice-President in the Foreign Department. I am familiar with the proceedings heretofore had in this action, and made an affidavit herein on December 14, 1934, in support of said defendant's motion to take the testimony before trial of Boris Bakhmeteff and Serge Ughet.

This action involves the account formerly standing on the defendant's books under the title Section Etrangere Ministere des Finances and belonging to the Russian Government, which account was set off by the defendant in part [fol. 368] payment of its own claims against the Russian Government on February 25, 1918. I am informed by defendant's attorneys that the United States Attorney has requested certain information with respect to the origin of this account, particularly the correspondence had by the defendant with the Russian Government at that time, in connection with defendant's pending motion to dismiss the action. While advised by counsel that the information requested is for the most part irrelevant to such motion, I make this affidavit for the purpose of meeting the request of the United States Attorney.

1. Defendant's files contain a copy of a cablegram dated Petrograd May 25, 1916, and signed by three representatives of New York banks, including Rolph Marsh, now deceased, who was a representative of Guaranty Trust Company of New York. This cablegram outlined a plan for the opening to the Imperial Russian Government by National City Bank and by Guaranty Trust Company of a credit of $50,000,000, and contained the words:

"Twenty-five Million Dollars of the loan to be placed to the credit of the Imperial Russian Government at the National City Bank in New York and Twenty-five Million Dollars to be placed to the credit of the Imperial Russian Government in the Guaranty Trust Company in New York."

It appears from defendant's files that this proposed $50,000,000 credit was actually established, on July 10, 1916, and that on July 10, 1916, Guaranty Trust Company of New York cabled the Chancellor of Credit, Imperial Russian Government, Petrograd, as follows:

[fol. 369] "A group consisting of J. P. Morgan and Company, National City Bank, Kidder Peabody and Company, Lee Higginson and Company and ourselves have today established a credit in New York of Fifty Million Dollars in favor of the Imperial Russian Government (stop) The resultant funds will be deposited with the several members of the group but drafts covering any unused portion of the credit may now at any time be drawn in equal amounts on the National City Bank and ourselves our two institutions making requisite adjustments with other members of the group"

Further it appears from defendant's files that on July 18, 1916, Guaranty Trust Company of New York cabled the Chancellor of Credit at Petrograd as follows:

"On July Tenth value July Eleventh we opened credit of Twenty Five Million Dollars in name of Section Etrangere du Minister des Finances de Russie on the same terms as the same account at National City Bank"

The cablegrams exchanged by the defendant with the Russian Government authorities in Petrograd in connection with the loan do not describe the Section Etrangere

Ministere des Finances account, except as set forth in the foregoing extracts therefrom.

2. In accordance with the request of the United States Attorney the defendant has searched in its archives for the correspondence in connection with the opening of the said [fol. 370] account, and has found and produces the documents of which photostatic copies are annexed hereto marked as follows:

Letter from The National City Bank of New York to Guaranty Trust Company of New York dated July 18, 1916: Exhibit 27.

Letter from The National City Bank of New York to Guaranty Trust Company of New York dated July 19, 1916: Exhibit 28.

Document in French dated at Petrograd September 1915 and signed by D. Nikiforoff with attached list of signatures: Exhibit 29.

Letter in French from Credit Chancery of Ministry of Finance of Imperial Russian Government to Guaranty Trust Company of New York dated July 19, 1916: Exhibit 31.

Carbon file copy of letter from Guaranty Trust Company of New York to Ministry of Finance of Imperial Russian Government at Petrograd September 8, 1916: Exhibit 33.

Correct English translations of the above described Exhibits 29 and 31 are attached hereto marked respectively Exhibits 30 and 32.

No signature list or instruction with respect to the persons who would draw upon the account on behalf of the Russian Government are contained in defendant's files other than the document marked Exhibit 29 hereto. Two [fol. 371] copies of said document appear in defendant's files, and it is my conjecture that one of these copies was enclosed by National City Bank in its letter of July 19, 1916, Exhibit 31 hereto. Defendant's files contain the carbon copy of a cablegram from it to the Chancery of Credit at Petrograd dated July 20, 1916, reading as follows:

"We have received from National City Bank list dated September Nineteen Hundred Fifteen giving signatures of those authorized to check against account of the Section Etrangere Ministere des Finances shall we use this in honoring withdrawals"

3. In addition to the foregoing defendant has discovered in its archives a printed form of cipher code referred to in the Credit Chancery's letter of July 6/19, 1916, Exhibit 28 hereto. This cipher code contains typewritten numerals and ink additions, bears the seal of the Imperial Russian Government, and is marked:

"Ministere des Finances de Russie, Section Etrangere, St. Petersbourg"

Preceding the typewritten numerals which constitute the code, this document contains an explanation of the method by which test numbers used in Credit Chancery cablegrams would be made up by combining the date of dispatch, the month, etc.

4. I have examined the files of correspondence of the defendant with the Foreign Section of the Credit Chancery of the Ministry of Finance relative to the operation of the [fol. 372] account entitled Section Etrangere Ministere des Finances on the books of the defendant in and after July 1916. All payments made out of this account by the defendant were made upon cable order signed "Ministere des Finances" or the like and bearing in each case a test number in conformity with the said cipher code. Each of these cablegrams ordering payments was confirmed by a letter on the letterhead of the Foreign Section of the Ministry of Finance bearing the signature of some person on behalf of the Director or Vice-Director of the Credit Chancery and the signature of some person on behalf of the Chief of the Foreign Section. For the most part these confirmatory letters are signed by C. Rodin on behalf of the Director and by A. Boyarinsky on behalf of the Chief of the Foreign Section. Sometimes, however, the signature of P. Fetterlein appears on behalf of the Vice-Director instead of a signature for the Director. Some letters are also signed by C. Tschoubakoff on behalf of the Chief of the Foreign Section, and some by D. Grimm on behalf of the Chief of the Foreign Section. A few letters are signed by A. Boyarinsky for the Vice-Director and by A. Deviatkine for the Chief of the Foreign Section.

The latest letter contained in the records and archives of the defendant from the Foreign Section of the Credit Chancery of the Ministry of Finance with respect to the said account is dated June 21, 1917, modern style, or June

8, 1917, Russian style, and was received by the defendant (according to the time stamp thereon) on August 25, 1917. No cablegrams from said Foreign Section authenticated [fol. 373] by said cipher code after the year 1916 have been located by the defendant in its archives despite a diligent search therefor. No payments were made by the defendant out of the Section Etrangere Ministere des Finances account after November 7, 1917. The latest payment made by the defendant out of the said account was made on July 10, 1917, apart from a debit appearing under date of August 13, 1917, which reverses a previous erroneous credit entry.

5. There is attached hereto marked Exhibit 34 a photostatic copy of a memorandum appearing in defendant's credit file under the title of the said account, dated March 19, 1917, and initialed G.M.P.M. Defendant's records show that Mr. Grayson M.-P. Murphy was then a Vice-President. I am familiar from the course of business of the defendant with the form upon which this memorandum appears and with the method in which memoranda upon this form were prepared, distributed, copied and filed, and I believe the attached Exhibit 34 to be a true copy of a memorandum made by Mr. Murphy on March 19, 1917, in the regular and usual course of business of the defendant.

J. Paul Huber.

Sworn to before me this 27th day of January, 1936.
H. A. Meinken, Notary Public, Nassau County No. 2048.

[fol. 374]. In United States District Court

[Title omitted]

Reply Affidavit of Dimitry G. Ter-Assatouroff

State of New York,
County of New York, ss:

Dimitry G. Ter-Assatouroff, being duly sworn, says:

I am the same person who made and verified affidavits in this action on October 7, 1935 and on November 22, 1935. The latter affidavit reproduces a stenographic transcript of

answers made by me to questions put by Leon E. Spencer, Assistant United States Attorney for the Southern District of New York, at the United States Consulate General in Montreal, Canada, in which city I reside.

1. Among the said questions and answers appear the following:

[fol. 375] "Q. Do you remember the names of those two people?

"A. It was not two people in particular. There may have been at least fifteen; any two of those fifteen. The signatures of those were sent to the banks which were holding those amounts, because they were the people who had something to do with those accounts. They were in charge of those particular accounts. It was a formality. At that time nobody foresaw the possibility of any trouble with respect to those accounts."

The list approximating fifteen referred to in this answer was comprised of the signatures of the Director of the Credit Chancery, the Vice-Director, the Director of the Foreign Section (Section Etrangere), the Chief of the Second Section, the Chief of the First Bureau of the Second Section, the Assistant Chief of said First Bureau, together with a certain number of deputies and a number of minor employees of the various sections. The signatures of these minor employees were included as a matter of technical convenience. I have examined a photostatic copy, marked Exhibit 29, of a circular letter in French dated at Petrograd September 1915 and signed by D. Nikiforoff with an annexed list of six signatures. I knew Mr. Nikiforoff in Russia as Director of the Credit Chancery, and knew Mr. Rodine, whose name appears on the said signature list, as Director of the Foreign Section. The other five names appearing on Exhibit 29 are names of persons all of whom (except Mr. Taurit, who occupied a rank second or third after the Di-[fol. 376] rector of the Foreign Section) were minor employees of the Foreign Section. None of these five persons were technically government officials, all being employed on contract.

The bulk of the Russian Government's accounts abroad before and during the war were operated and controlled through the First Bureau of the Second Section of the Credit Chancery. The head of the Second Section in 1916

was A. C. Timkowsky. The functions of the Second Section were to raise and to handle all government loans both internal and external. The function of the Foreign Section was more particularly to operate in foreign currencies through arbitrage and other forms of foreign exchange trading, and also to issue letters of credit for officials serving abroad on government missions.

2. Among said questions and answers appear also the following:

"Q. I suppose the Guaranty Trust Company took the position that the account was subject to withdrawal by officials of the Chancellery of Credit and that the Russian Ambassador was never authorized to do so.

"A. Naturally, the Guaranty Trust Company stood on a perfectly formal point of view, which was, I believe, the only point of view which a bank should take, but the National City Bank agreed."

I did not mean by this statement to say that Guaranty Trust Company rested its refusal to pay only on the formality of [fol. 377] signatures, inasmuch as I understood at the time that the refusal to pay was on account of Guaranty Trust Company's own claims against Russia.

Among the said questions and answers also appear the following:

"Q. Did anyone associated with the Guaranty Trust Company ever ever say anything in your presence to give you the impression that they would be unwilling to surrender the balance of the deposit account in the event that the authorized signatures from the Chancellery of Credit were communicated to them?

"A. Well, that was even expressed in the letter of Mr. Sabin in the letter which we got in December 1917 or January 1918. Mr. Sabin thought that under the then circumstances in Russia he would be very doubtful whether he could honor the signatures of those two people.

"Q. Other than the information which you gained from that letter you couldn't say?

"A. I don't remember that much.

"Q. Your answers to the last two questions are wholly predicated on the letter of Mr. Sabin in December 1917 or January 1918?

"A. Yes."

I did not intend by these answers to give the impression that I did not know whether Guaranty Trust Company would surrender the account if the authorized signatures of the Credit Chancery were furnished, but rather to say that to my recollection there was no discussion whether or not such signatures should be furnished. In fact I knew that [fol. 378] guaranty Trust Company would not surrender the account whether or not authorized signatures were furnished, because I knew (as above stated) that the refusal to pay was due principally to Guaranty Trust Company's claims against Russia.

Mr. Spencer in his said questions never directed my attention to or inquired what was the principal reason in my mind for Guaranty Trust Company's refusal to pay. Among his questions he asked the following and I made the following answer:

"Q. I suppose you would be willing to say that the reluctance of the Guaranty Trust to surrender this deposit account to the Russian Embassy was predicated upon their uncertainty concerning developments in Russia?

"A. I believe so, that that was one of the reasons."

Subsequently he asked the following question and I made the following answer:

"Q. I ask that question principally as the result of your having said that the principal reason for the refusal of the Guaranty Trust Company to pay this account was due to the absence of the proper request for its payment?

"A. Well, that was the reason which Mr. Sabin expressed and again in the same letter he said that even with those two signatures he would be reluctant to make a payment."

Subsequently upon reading this question and answer and before executing my affidavit containing it, I struck out "the [fol. 379] principal reason" from Mr. Spencer's question and substituted "one of the reasons", so as to make the question and answer in my affidavit read as follows:

"Q. I ask that question principally as the result of your having said that one of the reasons for the refusal of the Guaranty Trust Company to pay this account was due to the absence of the proper request for its payment?

"A. Well, that was the reason which Mr. Sabin expressed and again in the same letter he said that even with those two signatures he would be reluctant to make a payment."

My reason for making this change was to make it clear that I understood at the time that Guaranty Trust Company's allusion to the absence of authorized signatures was only a technical reason for its refusal to pay and that the real or principal reason was its claims against Russia.

3. Among the said questions and answers also appear the following:

"Q. Did you go with Mr. Bakhmeteff and Mr. Ughet to the Guaranty Trust Company?

"A. No. After that I was on several occasions with Mr. Ughet at the Guaranty Trust when he was having conversations with them in order to have the funds released."

In answering "No", I had in mind Mr. Ughet's first visit to [fol. 380] Guaranty Trust Company in December 1917. Upon subsequent occasions I was several times personally with Mr. Ughet at Guaranty Trust Company, as explained in both my said affidavits.

Among the said questions and answers also appear the following:

"Q. Did you have your conversations with Mr. Sabin of the Guaranty Trust?

"A. Not myself, I didn't talk about that although I remember that once I went there and talked to Mr. Albert Breton and presented again that request on behalf of Mr. Ughet although as I say personally, I was doing that as a matter of discipline because it was the policy of the office and I didn't express my views to the Guaranty Trust Company."

By this answer I mean only that, when Mr. Ughet and I called upon Mr. Sabin as stated in my affidavit verified October 7, 1935, the conversation on behalf of the Russian Embassy was conducted by Mr. Ughet and not by myself. The same is true of the other visits which I made to Guaranty Trust Company in company with Mr. Ughet.

4. I have read Mr. Ughet's affidavit herein verified November 27, 1935, in which he says:

"That deponent has read the affidavit of Mr. Ter-Assatouroff and believes it is erroneous and has no recollection that he ever conferred with Mr. Sabin or anyone on behalf of the Guaranty Trust Co. in the presence of Mr. Ter-Assatouroff, and further, deponent states on information

[fol. 381] and belief that he never requested 'Guaranty Trust Co. to place at the disposal of the Russian Embassy' the sum of $4,976,722.78. (Assatouroff affidavit dated October 7, 1935, page 5.)"

My own recollection on the subject is quite clear and is not affected by the foregoing statement.

Dimitry G. Ter-Assatouroff.

Sworn to before me this 16th day of December, 1935.
Wm. H. Bruder, Notary Public, Bronx County No. 122.

[fol. 382] In United States District Court

[Title omitted]

Reply Affidavit of Grayson M.-P. Murphy

State of New York,
County of New York, ss:

Grayson M.-P. Murphy, being duly sworn, says:

I am a member of the firm of Grayson M.-P. Murphy & Co., investment bankers, No. 52 Broadway, New York, N. Y., and made an affidavit herein on February 25, 1935.

In 1916 and 1917 I was a Vice-President of Guaranty Trust Company of New York, and was familiar with the opening of the account with Guaranty Trust Company of New York in the name of Section Etrangere Ministere des Finances as described in the affidavit of J. Paul Huber herein verified January 27, 1936, which affidavit I have read. With respect to the conversations described in the memorandum bearing my initials dated March 19, 1917, of which a photo-[fol. 383] static copy is attached to Mr. Huber's affidavit as Exhibit 34, I retain no independent recollection. From the fact that a copy of this memorandum appears in the credit files of Guaranty Trust Company of New York in regular order under the date of March 19, 1917, and from my knowledge of the course of business of the defendant at that time, which I obtained as Vice-President, I believe and have no doubt that I did dictate and initial the memorandum in

question, and that the conversations therein described took place as stated in said memorandum.

Grayson M.-P. Murphy.

Sworn to before me this 13th day of February, 1936.
Samuel E. Gruman, Notary Public, Kings County.

[fol. 384] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY AFFIDAVIT OF JOHN WATTS

STATE OF NEW YORK,
County of New York, ss:

John Watts, being duly sworn, says:

I am Vice-President and Secretary of Mulliken & Co., investment bankers, No. 52 Broadway, New York, N. Y. From 1913 to August 1917 I was head of the Bookkeeping Department of Guaranty Trust Company of New York, and was in that capacity familiar with the account appearing on its books under my supervision under the title Section Etrangere Ministere des Finances. About August 1917 I was transferred to the Foreign Department of Guaranty Trust Company.

1. As head of the Bookkeeping Department I paid particular attention to the said Section Etrangere Ministere des Finances account, for the reason that upon the opening of the account Mr. Sabin, President of Guaranty Trust Company, instructed me to do so. I have read the affidavit of J. Paul Huber herein verified January 27, 1936, and con-[fol. 385] firm Mr. Huber's statement with respect to the manner in which payments out of the account were handled.

2. Monthly statements of account were prepared in the Bookkeeping Department under my supervision for the Russian Government. The Section Etrangere Ministere des Finances account was one of several under my supervision which were handled under special instructions; that is, they were not forwarded by mail or messenger in regular course to an address appearing under the name of the account. No address appeared upon the customers' ledger

of Guaranty Trust Company under the name of the account. The monthly statements covering the Section Etrangere Ministere des Finances account, when prepared, were placed on my desk, and were then checked off by me against the special instructions which I had for delivery. It is my definite recollection that these monthly statements were not mailed to any address in Russia; and it is my best recollection that they were delivered to an office in the Flatiron Building at 23rd Street, either by a messenger of Guaranty Trust Company or by someone calling from that office and taking the statements from the Bookkeeping Department or the pass book window. The same of Serge Ughet is very familiar to me in connection with this account, and I have a recollection of having had some transactions with him with respect to the account, but cannot at this time recollect what those transactions were.

John Watts.

Sworn to before me this 13th day of February, 1936.
Matthew V. Stepsis, Notary Public, Kings County.

[fol. 386] In United States District Court

[Title omitted]

Reply Affidavit of Ralph M. Carson

State of New York,
County of New York, ss:

Ralph M. Carson, being duly sworn, says:

I am one of the attorneys for the defendant herein and am familiar with all proceedings heretofore had in this action.

1. In an action in the Supreme Court, New York County, entitled P. V. Baranowsky Company, Ltd., plaintiff, against Guaranty Trust Company of New York, defendant, Conrad de Sahmen testified upon deposition in Paris, France, in my hearing, in September 1931, as follows:

"Q. 1. Are you at present engaged in any business, Mr. de Sahmen?

A. Yes, I am acting as financial adviser to private companies.

Q. 2. Are you a Russian citizen?

A. I am a Russian refugee with a League of Nations passport.

[fol. 387] Q. 3. Where and when were you born?

A. On the twenty-fifth of June, eighteen hundred and seventy-four.

Q. 4. In Russia?

A. In Russia.

Q. 5. When did you leave Russia?

A. In December nineteen hundred and eighteen.

Q. 6. When did you come to Paris?

A. March nineteen hundred and nineteen.

Q. 7. After you left Russia where did you first reside?

A. From nineteen hundred and nineteen, the second part of nineteen hundred and nineteen, till nineteen hundred and twenty-seven I have been residing in London and since then in Paris.

Q. 8. Before you left Russia were you connected with the Chancery of Credit?

A. Yes, I was.

Q. 9. When did you first become connected with the Chancery of Credit?

A. I started as volunteer clerk in eighteen hundred and ninety-six and I worked up gradually to the position of Director which I became in December nineteen hundred and sixteen.

Q. 10. What position did you hold in the Chancery of credit in the latter part of the year nineteen hundred and fifteen?

A. I was Vice-Director.

Q. 11. Did you go out of Russia during the latter part of the year nineteen hundred and fifteen?

A. Yes, I left on the nineteenth of August, nineteen hundred and fifteen; I came back in May, nineteen hundred and sixteen, stayed a short time and then went back together with the then Minister of Finance, Mr. Bark, who was going [fol. 388] for official negotiations to London and Paris, and I came back with him in July nineteen hundred and sixteen, from which time I stayed in Petrograd.

Q. 12. When you left Russia in nineteen hundred and fifteen and stayed away until May nineteen hundred and sixteen, where were you?

A. In London and Paris on an official mission as a delegate of the Russian Treasury to arrange the working of inter-allied credits.

Q. 13. You say you came back finally in July nineteen hundred and sixteen?

A. Yes.

Q. 14. When you came back to Petrograd in July nineteen hundred and sixteen, what duties did you then undertake?

A. I actually took up the duties of Director of the Chancery.

Q. 15. Who had been the Director prior to that time?

A. Mr. Nikiforoff.

Q. 16. At the outset were you given the official title of Director?

A. In July nineteen hundred and sixteen Mr. Nikiforoff left on leave of absence; then he became a member of the Russian Senate, and from that time until the third of December nineteen hundred and sixteen, except for a month, when the Vice Minister of Finance, Mr. Theodosieff was officially in charge. I was actually in charge of the Chancery until I was officially nominated.

Q. 17. How long did you stay in charge as Director?

A. Until November nineteen hundred and seventeen.

Q. 18. Shortly after, or about the time of the bolshevik revolution?

A. Yes.

Q. 19. Do I understand that you ceased to be that at the [fol. 389] time of the bolshevik revolution?

A. Yes, as soon as they got actually in power.

Q. 20. And you went out when the bolsheviks went in?

A. Yes."

Upon cross-examination he testified:

"X Q. 344. Do I correctly understand that you had no connection whatever with the Credit Chancery from about November seventh, nineteen hundred and seventeen, new style, the date of the Bolshevik revolution?

A. Yes.

X Q. 345. You had no connection with it after that date?

A. No.

X Q. 346. You don't know what happened to the Credit Chancery after that date?

A. No, I don't.

X Q. 347. What was the condition of affairs in the Credit Chancery about the time you left?

A. In what respect?

X Q. 348. As to whether or not business was going on as usual?

A. No, business had been stopped immediately after the Bolsheviks got into power, and I think the staff did not restart work for about two months or even more.

X Q. 349. But you were not there at that time?

A. I was not there at the time. I have been going to my office until, I think, the middle of November, about the twentieth of November, when I was warned that I would be arrested if I went there any more. At the same time was published the Soviet decree dismissing me.

X Q. 350. Just before and about the time you left, was business going on in the ordinary fashion at the Chancery?

A. Until the staff struck, yes.

[fol. 390] X Q. 351. The staff struck about the seventh of November?

A. New style—a few days later, perhaps two days after."

In the same case Constantin Rodin testified upon deposition in Moscow, Russia, in August 1934 as follows:

Q. 1. Please give your full name and residence, if you have not already done so.

A. Rodin, Constantin Fedorovich, U. S. S. R., City of Moscow, Ostojenka Street, No. 46, Apt. 4.

Q. 2. What position, if any, did you hold in the Ministry of Finance of the Russian Government during the war?

A. During the war from June 1915 I was in charge of the Foreign Department of the Credit Chancery of the Ministry of Finance.

Q. 3. When did you first enter the employ of the Ministry of Finance and in what position?

A. I was attached to the Ministry of Finance from 1903 as a candidate official.

Q. 4. What position, if any, did you occupy in the Ministry of Finance of the Russian Government in January and February 1916?

A. In January and February 1916, I was in charge of the Foreign Department of the Credit Chancery.

Q. 5. How long did you hold such position?

A. I occupied the position of chief of the Foreign Department from June 1915 until the October Revolution.

Q. 6. Please state in detail the duties which you performed in the Ministry of Finance in the position occupied by you. [fol. 391] in and after January 1916.

A. As Chief of the Foreign Department I was in charge of the general supervision over activities which had as a purpose the supplying of the State institutions and private firms and persons with foreign currency for payments to be made on the matters approved by special commissions or by the Director of the Credit Chancery or by the Minister of Finance. In addition thereto, I supervised the activities of the purchase of foreign currency for export; I investigated questions of supply and demand of foreign currency and the rates of exchange of the ruble from day to day; I drafted certain measures in connection with foreign currency; I worked out certain measures to be adopted in connection with foreign currency, such measures being suggested by the Minister of Finance and by the Director of the Credit Chancery; I supervised the preparation and collection of data concerning the Foreign Department for the International Finance Conferences; I participated either personally or by substitutes in various Commissions, including the Foreign Currency Commission (Valuta Committee); I was the chairman of the Accounting Division and carried out administrative functions concerning the organization of the work, of said division."

In the same case Serge G. Feodossief testified on deposition in my hearing in April 1932 at Paris, France, as follows:

"Q. 1. Mr. Feodossief, will you give your present occupa- [fol. 392] tion, please?

A. I have no occupation at all now.

Q. 2. What was your occupation in Russia from nineteen hundred and fourteen on?

A. I was the head of the Chancery of General Affairs (as we called it in Russia) of the Ministry of Finance from April, nineteen hundred and fourteen, until the beginning of October, nineteen hundred and sixteen, and in August—I think it was the eighth of August, nineteen hundred and sixteen—I was appointed Vice-Minister of Finance, and at the same time I was left as Manager of the Chancery of General Affairs of the Ministry of Finance until October tenth, nineteen hundred and sixteen, when I was moved—remaining Vice-Minister of Finance—I was moved to the post of Manager of

the Chancery of Credit, where I remained until November thirtieth of the same year; and at that date I was appointed, as we call it in Russia, 'Comptroller of the Empire' and member of the Council of Ministers.

Q. 3. How long did you retain your post as Comptroller of the Empire?

A. Until the Revolution.

Q. 4. Which one?

A. Until the first Revolution, until the first of March nineteen hundred and seventeen, that is, the first of March old style, which is on the fourteenth of March new style.

Q. 5. When did you leave Russia?

A. Oh, I left Petrograd for Siberia at the end of nineteen hundred and seventeen, and I left Siberia at the beginning of nineteen hundred and twenty.

[fol. 393] Q. 6. Have you returned to Russia since then?

A. No, never.

. . . . . .

Q. 13. What was the Chancery of Credit?

A. The Chancery of Credit was the chief Department for the service of Russian loans at first, and all the payments for the Russian loans or contractual obligations on Russian loans were made through the Chancery of Credit, and a special estimate was yearly presented to the highest body of the Russian State, the Duma and the Council of the Empire, and all these sums necessary for the contractual obligations of the Russian States included therein. That was its first duty. Then, all contracts for new loans passed through the Credit Chancery, and all questions connected with foreign exchange. In the time before the war we had in Russia a free market for foreign exchange, as practically in every other country, and the dealings in foreign exchange were chiefly made through the Russian private banks; but still, sometimes the Government had to step into the foreign exchange market in order to keep the rate of exchange of the rouble more or less stable. When the rouble rose or the rouble fell, the Chancery of Credit (when this was not done by the other private banks) appeared on the market and either bought the exchange, the foreign exchange, in the one case, or sold it in the other case, and so kept the rate of the rouble stable. That was one of the important duties of the Credit Chancery before the War, and it was somewhat [fol. 394] changed by the conditions of the war, but re-

mained more or less the same during the war itself. Then the third duty of the Credit Chancery was to keep the account of loans made by the Government to private persons, to official bodies, or to anybody who might take money from the Government. All these loans were booked in the Credit Chancery, and the Chancery had to see that all the conditions of the loan were fulfilled, the payments due, made, and so on. Then the fourth duty of the Chancery was the supervision of the private banks, of the Banks of short-term credit (as we called them in Russia), and of the Banks of long-term credit, or Land Banks. I think these duties were the chief among the duties of the Credit Chancery.

Q. 14. Who was head of the Credit Chancery at the beginning of the war?

A. It was Mr. Nikiforoff.

Q. 15. Who succeeded him as head of the Credit Chancery, and when?

A. I succeeded him as head of the Credit Chancery; I think about the end of September, or the very beginning of October, he was appointed Senator and left the Credit Chancery, and I, being Vice-Minister of Finance at that time and managing the Chancery of General Affairs, was moved to the Credit Chancery.

Q. 16. How long did you remain head of the Credit Chancery?

A. Until the time when I was appointed Comptroller of the Empire, that was the thirtieth of November nineteen hundred and sixteen."

[fol. 395] 2. I have examined the filed papers in this Court in the actions in which judgment was affirmed by the Circuit Court of Appeals in 21 F2 396, 406, under the title State of Russia v. Lehigh Valley R. Co., which are filed in the Clerk's Office, under the file numbers L19-2 and L19-3. Orders signed in this Court in the said actions by Hon. Francis A. Winslow, United States District Judge, on December 21, 1927, recite that the defendant therein paid to the Clerk of the Court on December 19, 1927, the respective judgments in the amount of $980,431.24 in Action No. 1, L19-2, and in the amount of $3,673.38 in Action No. 2, L19-3. A copy of the order in Action No. 1 as signed by Judge Winslow on December 21, 1927, is hereto attached marked Exhibit 24. Attached to the original order in said file is an original letter dated December 20, 1927, signed by Robert E. Olds

as Acting Secretary of State, and an original letter dated February 19, 1923, signed by Charles E. Hughes, as Secretary of State. Copies of the said two letters are hereto annexed marked Exhibits 25 and 26 respectively.

3. I attended in the Chambers of Judge Winslow on December 21, 1927, at the time said orders were signed by him. There were also present, among others, Mr. Serge Ughet, Financial Attache to the Russian Embassy; Frederic R. Coudert, Sr., one of the attorneys for the State of Russia in the action; and Edward B. Levy, a member of the New York Bar. Before the signature of the orders Mr. Levy stated to the Court in my hearing that he represented Howard B. Zonis of Boston; that his client owned obligations of the Imperial Russian Government of a principal amount of [fol. 396] 1,000,000 rubles; and that before the moneys in court belonging to the State of Russia should be paid out, he desired time in which to perfect an attachment on or an equitable sequestration of said moneys to secure payment of his client's claim. Judge Winslow stated that the idea of impounding this fund in such a way was unthinkable; that the fund was Government property payable to a diplomatic officer in accordance with a judgment rendered; and that the Court had no option but to sign the order if it was in due form. Mr. Ughet said that pursuant to his arrangement with the Treasury of the United States the money paid to him upon the judgments pursuant to the orders to be signed would, after payment of his expenses, be turned over to the Treasury for application upon the indebtedness of the Provisional Russian Government to the United States. Following this discussion Judge Winslow signed the orders.

4. I have read a certified copy of Dispatch No. 1146 from Loy W. Henderson, Esq., American Charge d'Affaires ad Interim at Moscow, USSR, dated December 11, 1935, with the papers thereto attached, copies of all of which were served on defendant's attorneys by the United States Attorney on February 1, 1936. I was personally familiar at the time with the sending of all the communications of which copies are included in the said papers numbered 1 to 7 inclusive.

The enclosures numbered 1, 4, 5 and 7 related exclusively to an action then and now pending in the New York State courts brought in the name of P. V. Baranowsky Company, Ltd. against the defendant to recover $1,707,169.86 formerly

[fol. 397] standing with the defendant in the name of Russo-Asiatic Bank. Neither the said litigation nor the said Russo-Asiatic Bank account has any relationship whatever to the above-entitled action or the Section Etrangere Ministere des Finances account involved herein, and defendant's attorneys are at a loss to understand why these documents should be interposed by the United States Attorney as a defense upon the motion to dismiss this action.

The enclosures in said papers numbered 2, 3 and 6 relate to negotiations had by or on behalf of the defendant with representatives of the Soviet Government prior to the assignment by that Government to the United States on November 16, 1933, of its claim to the Section Etrangere Ministere des Finances account. These negotiations, as the said enclosures show, contemplated the settlement of claims generally as between the Soviet Government and the defendant, including the claim of the Soviet Government to the said account. It is submitted that, even if relevant to the issues on the pending motion to dismiss, any reference to the settlement negotiations in connection with the determination of such issues is quite as improper as if such negotiations were had directly between plaintiff and defendant.

Ralph M. Carson.

Sworn to before me this 13th day of February, 1936. Wm. H. Bruder, Notary Public, Bronx County No. 122.

[fol. 398] DEFENDANT'S EXHIBIT 24

At a Stated Term of the United States District Court for the Southern District of New York, held at the Federal Court House and Post Office Building in the Borough of Manhattan, City of New York, on the 21 day of December, 1927.

Present: Hon. Francis A. Winslow, Judge.

Action No. 1. L. 19/2

THE STATE OF RUSSIA, Plaintiff,

against

LEHIGH VALLEY RAILROAD CO., Defendant

A final judgment having been recovered by the plaintiff herein against the defendant herein bearing the date the

8th day of July, 1925, which judgment was affirmed by the Circuit Court of Appeals for the Second District under date of August 14, 1927, and the petition of the defendant for a writ of certiorari to the United States Supreme Court to review said judgment having been denied under date of December 12th, 1927; and the defendant Lehigh Valley Railroad having paid to the Hon. Alexander Gilchrist, Jr., the Clerk of this Court, on December 19th, 1927, the amount [fol. 399] of said judgment with interest and costs to said date in the total sum of $980,431.24.

Now upon all the proceedings heretofore had in this action and upon the opinion of the Court of Appeal for the Second Circuit rendered herein, and upon motion of Coudert Brothers, attorneys for the plaintiff herein, it is

Ordered, that the Hon. Alexander Gilchrist, Jr., the Clerk of this Court, be and is hereby directed to pay over the amount of said judgment with interest and costs as aforesaid in the total sum of $980,431.24 upon behalf of the plaintiff, to Serge Ughet, as the Financial Attache of the Russian Embassy, duly recognized as such by the Department of State of the United States Government.

Francis A. Winslow, U. S. D. J.

200,000.00.
780,431.24.

[fol. 400] DEFENDANT'S EXHIBIT 25

December 20, 1927.

To the United States District Court, Southern District of New York:

This is to certify that Mr. Serge Ughet, the Financial Attache of the Russian Embassy, is recognized by the Government of the United States as the custodian of the property of the State of Russia in the United States, and that the status of said Serge Ughet with this Government has not been altered since the date of the letter of the Honorable Charles E. Hughes, Secretary of State of the United States, to the Honorable Lindley M. Garrison of February 19, 1923.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of State to be affixed

this twentieth day of December, one thousand nine hundred and twenty-seven.

Robert E. Olds, Acting Secretary of State.

RFK: EBS.
EE.
311.6154 L 52/21.

[fol. 401] DEFENDANT'S EXHIBIT 26

Department of State, Washington

Feb. 19, 1923.

MY DEAR JUDGE GARRISON:

In reply to the inquiry contained in your letter of February 17, 1923, and to certain additional inquiries made orally today by your partner, Mr. Raoul E. Desvernine, I have to inform you that the so-called Provisional Government of Russia, which succeeded to authority upon the abdication of the Czar, was recognized by the Government of the United States on March 22, 1917. On July 5 of the same year Mr. Boris Bakhmeteff was received by the President as the Ambassador Extraordinary and Plenipotentiary of the newly recognized Government.

Mr. Bakhmeteff continued to be recognized as the Ambassador of Russia to the United States until June 30, 1922. The custody of the property of the Russian Government in this country, for which Mr. Bakhmeteff has been responsible, was, after the date of his retirement, considered to vest in Mr. Serge Ughet, the Financial Attache of the Russian Embassy, whose diplomatic status with this Government was not considered to be altered by the termination of the Ambassador's duties.

In answer specifically to your questions, I may say that the United States has not recognized any other Government in Russia since the fall of the Provisional Government, to which reference is made above.

The regime now functioning in Russia and known as the Soviet Regime has not been recognized by the United States.

Sincerely yours, (Signed) Charles E. Hughes.

Hon. Lindley M. Garrison, 24 Broad Street, New York City.

[fol. 402] DEFENDANT'S EXHIBIT 27

The National City Bank of New York

New York, July 18, 1916.

In replying please quote initials JTC.

Mr. G. M. P. Murphy, Vice-President, The Guaranty Trust Company, New York, N. Y.

DEAR SIR:

In accordance with request of our Vice-President, Mr. Perkins, I take pleasure in advising you that the following are the conditions governing the account on our books in the name of "Section Etrangere du Minister des Finances de Russie:

We credit interest monthly at the rate of 2% per annum on Credit balances.

We debit monthly a commission of ⅛% on all debits, or disbursements appearing on the debit side of the account.

This I trust will give you the information you require and enable you to conform your conditions with our own as regards this particular account.

Respectfully, J. T. Cosby, Manager.

JTC: JTS.

[fol. 403] DEFENDANT'S EXHIBIT 28

The National City Bank of New York

New York, July 19, 1916.

In replying please quote initials JTC.

The Guaranty Trust Company of New York, 140 Broadway, New York, N. Y.

Mr. W. P. Conway

DEAR SIR:

Referring to your conversation with Mr. Perkins, and also telephone conversation of this afternoon, I take pleasure in handing you herewith duplicate copy of the latest list of signatures which we hold of those authorized to check

against the account of the Ministere des Finances Section Etrangére, Petrograd, on our books.

Respectfully, J. T. Cosby, Manager.

JTC:JTS.
Enclosure.

[fol. 404] DEFENDANT'S EXHIBIT 29

Petrograd, Septembre 1915.

(Seal)

Ministère des Finances

Chancellerie des Opérations de Crédit

Section Etrangère

MESSIEURS,

Nous avons l'honneur de vous faire part que Mr. Putzberg, Directeur de notre Section Etrangère après un service de plus de 40 ans quitte son poste et se retire dans la vie privée.

Mr. V. Pehmoeller quittant de même la Section Etrangère pour être nommé fonctionnaire en missions spéciales près notre Ministère des Finances ne signera plus pour le Directeur de la Section Etrangère.

En remplacement de Mr. W. Putzberg Mr. C. Rodine est nommé Chef de la Section Etrangère et signera en cette qualité.

Les lettres de la Section Etrangère porteront dorénavant deux signatures savoir celle du Directeur de la Chancellerie des Opérations de Crédit ou celle du Vice-Directeur ainsi que celle du Chef de la Section Etrangère.

Mr. C. Rodine est en même temps autorisé à signer pour le Directeur de la Chancellerie des Opérations de Crédit.

Les effets et les lettres de crédit créés par la Section [fol. 405] Etrangère porteront deux signatures, savoir celle du Chef de la Section Etrangère et celle du Contrôleur.

En cas d'absence de Mr. Rodine la signature pour le Chef de la Section est confiée à Mr. A. Boyarinsky et à Mr. C. Taurit.

Mr. A. Bauer ne signera plus pour le Contrôleur.

Mr. D. Grimm continuera à signer en qualité de Contrôleur.

Mr. C. Tschoubakoff de même que Mr. A. Deviatkine signeront pour le Contrôleur.

Veuillez prendre note des signatures ci-après et agréez, Messieurs, nos salutations distinguées

Le Directeur de la Chancellerie des Opérations de Crédit

D. Nikiforoff. Mr. C. Rodin signera: C. Rodine. Mr. A. Boyarinsky signera: A. Boyarinsky. Mr. C. Taurit signera: C. Taurit. Mr. D. Grimm signera: D. Grimm. Mr. C. Tschoubakoff signera: C. Tschoubakoff. Mr. A. Deviatkine signera: A. Deviatkine.

[fol. 406] DEFENDANT'S EXHIBIT 30

[Seal]

Ministry of Finance

Chancery of Credit

Foreign Section

Petrograd September 1915.

GENTLEMEN:

We have the honor to inform you that Mr. Putzberg, Chief of our Foreign Section, after a service of more than forty years, is resigning his post and retiring to private life.

Mr. V. Pehmoeller, likewise resigning from the Foreign Section to become a representative of our Ministry of Finance on special mission, will no longer sign for the Chief of the Foreign Section.

In the place of Mr. W. Putzberg, Mr. C. Rodine is designated Chief of the Foreign Section and will sign in that capacity.

The letters of the Foreign Section will henceforward bear two signatures, i. e. that of the Director of the Credit Chancery or that of the Vice-Director, as well as that of the Chief of the Foreign Section.

Mr. C. Rodine is at the same time authorized to sign for the Director of the Credit Chancery.

Drafts and letters of credit issued by the Foreign Section will bear two signatures, that of the Chief of the Foreign Section and that of the Comptroller.

In the event of Mr. Rodine's absence, the signature for the Chief of the Section is entrusted to Mr. A. Boyarinsky and to Mr. C. Taurit.

[fol. 407] Mr. A. Bauer will no longer sign for the Comptroller.

Mr. D. Grimm will continue to sign in the capacity of Comptroller.

Mr. C. Tschoubakoff as well as Mr. A. Deviatkine will sign for the Comptroller.

Kindly take note of the signatures following and accept, gentlemen, our respectful greetings.

The Director of the Credit Chancery

D. Nikiforoff. Mr. C. Rodin will sign: C. Rodine. Mr. A. Boyarinsky will sign: A. Boyarinsky. Mr. C. Taurit will sign: C. Taurit. Mr. D. Grimm will sign: D. Grimm. Mr. C. Tschoubakoff will sign: C. Tschoubakoff. Mr. A. Deviatkine will sign: A. Deviatkine.

[fol. 408] DEFENDANT'S EXHIBIT 31

Petrograd, le 6/19 Juillet 1916.

Ministère Des Finances

Chancellerie

Des Opérations de Crédit

Section Etrangère

T

Guaranty Trust Company, New York

MESSIEURS,

Nous vous prions de porter au crédit du compte que vous voudrez bien ouvrir dans vos livres au nom de la Section Etrangère les:

$.25.000.000.—dont la National City Bank de votre ville nous avise vous avoir fait le versement.

Vous voudrez bien nous confirmer cette opération et que notre compte chez vous sera producteur d'intérêts créditeurs de 2% l'an.

Nous vous remettons ci-joint une circulaire vous portant les specimens de nos différentes signatures, et nous vous enverrons prochainement notre chiffre télégraphique.

Recevez, Messieurs, nos salutations distinguées.

Le Directeur C. Rodine.

Le Chef de la Section Etrangère

A. Deviatkine.

Adresse pour Finetrange. télégrammes.

[fol. 409] DEFENDANT'S EXHIBIT 32

Petrograd, 6/19 July 1916.

Ministry of Finance

Credit Chancery

Foreign Section

T

Guaranty Trust Company, New York

GENTLEMEN:

We beg you to carry to the credit of the account which you will kindly open on your books in the name of the Foreign Section the $25,000,000 which National City Bank of your city informs us that it remitted to you.

You will kindly confirm this transaction to us and that our account with you will be credited with interest at 2% per annum.

We transmit herewith a circular bearing specimens of our different signatures and we shall forward in the near future our telegraphic code.

Please accept assurances of our esteem.

For the Director C. Rodine.

For the Chief of the Foreign Section.

A. Deviatkine.

[fol. 410] DEFENDANT'S EXHIBIT 33

September 8, 1916.

Ministere Des Finances, Chancellerie, Le Directeur C. Rodine, Petrograd, Russia.

DEAR SIR:

We beg to acknowledge receipt of your favor of July 19, with regard to $25,000,000. deposit made by the National City Bank, which amount was credited under advice to an account in our books entitled "Section Etrangere Ministere des Finances."

We find enclosed in your favor circular letter showing specimen signatures of various Directors who are authorized to sign against this account in the withdrawal of funds. We are pleased to note that under instructions of circular letter dated September 1915 that letters of the foreign section will bear two signatures.

We have received the telegraphic code referred to in your favor of July 19th, and we will make payment from the funds to the credit of the above mentioned account on telegraphic advice when signed by Section Etrangers Ministere des Finances, provided the code word used checks correctly.

Yours very truly, —— ——, Treasurer.

NDP/JWB-102.

[fol. 411] DEFENDANT'S EXHIBIT 34

Credit Department

Section Etrangere Minister Des Finances—Russian Govt.

Officer will check department concerned
Auditing
Bond
√Bookkeepers
√Collection
Coupon
√Credit
Fifth Ave. Office
Filing

March 19th, 1917.

Spoke to Mr. Lamont and Mr. W. C. Potter after our Executive Committee meeting today to ascertain whether, in their judgment, it would be advisable for us to receive special authority from the new Government in Russia before disbursing funds on deposit here. It was

√Foreign
Legal
Loan
Mailing
Mail Tellers
√Paying Teller
√Publicity
Purchasing
Receiving Teller
Registration
Reorganization
Securities
Stenographers
Stock Bookkeepers
Telephone
Transfer
Trust

their opinion that we should continue to make disbursements under our previous instructions and without additional authority. However, when I suggested speaking to Mr. Ughet they thought it would be a good idea for me to do so.

I talked with Mr. Ughet, who advises me that we should absolutely continue to make payments in accordance with instructions, and said that he would say so to me in his official capacity. I have accordingly issued instructions for us to make payments of our Russian Government funds as heretofore.

GMPM.

[fol. 412] UGHET ASSIGNMENT

No. 6257

UNITED STATES OF AMERICA,
Department of State:

To all to whom these presents shall come, Greeting:

I Certify That the document hereunto annexed is a photostatic copy of an assignment dated August 25, 1933, made to the United States of America, its successors, and assigns, by Serge Ughet, as Russian Financial Attache and Custodian of the Property of the Russian Government in the United States, acting for and on behalf of the State of Russia. The original of this assignment is in the files of the Department.

In testimony whereof, I, Wilbur J. Carr, Acting Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this twenty-fourth day of December, 1935.

Wilbur J. Carr, Acting Secretary of State, by C. E. MacEahran, Chief Clerk. (Seal Department of State, United States of America.)

[fol. 413] Assignment, Annexed to Exhibit 35

Know All Men by These Presents that I, the undersigned, Serge Ughet, as Russian Financial Attache and Custodian of the Property of the Russian Government in the United States, acting for and on behalf of the State of Russia, for and in consideration of good and valuable considerations by the United States of America to the State of Russia paid, the receipt of which is hereby acknowledged, have assigned, transferred, set over and delivered and by these presents do assign, transfer, set over and deliver unto the United States of America, its successors and assigns, to its and their own proper use and benefit forever, all property, of whatsoever nature and description, in the United States belonging to the State of Russia, together with all claims and demands of every nature and description, whether legal or equitable, existing in favor of the State of Russia in the United States, or against any person, firm or corporation in the United States, or arising out of any contract or agreement or transaction in the United States or otherwise, including therein among others the following property and claims:

(1) Claim for approximately $4,976,722.78 with interest for a balance of the Russian Government with the Guaranty Trust Company of New York.

(2) Claim for approximately $15,000.00 against the Guaranty Trust Company of New York arising out of a contract with the Morton Truck & Tractor Company.

[fol. 414] (3) Claim for approximately $46,584.18 balance on deposit with the New York Trust Company on account of a bond issue of the Vladikavkas Railway Company.

(4) Claim for approximately $11,680.00 against the said New York Trust Company on account of a balance of a payment made by the Russian Financial Attache on or about September 10, 1918 in connection with the same bonds.

(5) Claim for approximately $140,000.00 against the National City Bank of New York on account of a payment made to the said bank regarding certain shoes ordered for working men and employees of the Vladikavkas Railway Company.

(6) Claim for approximately $1,050,000.00 with interest against the Curtis Aeroplane & Motor Company.

(7) Claim for approximately $384,118.07 with interest for moneys due from the Canadian Pacific Railway Company under contracts with the Russian Government.

(8) Claim for approximately $1,412,532.35 with interest on account of the amounts due by the United States Shipping Board for the requisition of Hulls Nos. 6 and 7 of the Russian Volunteer Fleet, action in connection with which is now pending in the United States Court of Claims No. 69 A.

(9) Claim for the sum of approximately $218,750.00 originally deposited with the Guaranty Trust Company as [fol. 415] escrow money on Hull No. 6 under the contract for the purchase of said hull by the said Russian Volunteer Fleet.

(10) Claim for the sum of approximately $23,643.75 on account of a balance due by the United States Shipping Board in connection with the charter of certain steamers of the said Russian Volunteer Fleet.

The foregoing list of claims is not intended to be exclusive. It is the intention of this assignment to transfer to the United States of America all property, rights and claims having a situs in the United States formerly belonging to either the Imperial Russian Government or the Provisional Russian Government.

Excluding from this assignment, however, the right, title and interest of the said State of Russia in and to the claim, demand or cause of action involved in the pending suit in equity in the United States District Court for the Southern District of New York, No. E 46-6, entitled "State of Russia, plaintiff, against Bankers Trust Company and National City Bank of New York, defendants."

In Witness Whereof, the said Serge Ughet as Russian Financial Attache and Custodian of the property of the Russian Government in the United States, acting for and on behalf of the State of Russia, has hereunto set his hand and seal this 25th day of August, 1933.

Serge Ughet, As Russian Financial Attache and Custodian of the Property of the Russian Government in the United States, Acting for and on behalf of the State of Russia.

[fol. 416] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 59, p. 80

UNITED STATES OF AMERICA, Plaintiff,

against

GUARANTY TRUST COMPANY OF NEW YORK, Defendant

New York, October 13, 1936.

Before Hon. Francis G. Caffey, District Judge

Appearances omitted

OPINION

[fol. 417] The Court: (Orally): What I shall say will be divided into three parts. I shall deal first with certain preliminaries; secondly, with the facts; thirdly, with the law.

What I shall include in the preliminaries is, in a sense, merely introductory. The design of it is two-fold. In part it is to point out what is not in controversy between the parties. In part it is to remove from further consideration what is irrelevant.

It is conceded by counsel, as I understand them,—and if not conceded it is clearly true,—that if the statute of limitations had run against the assignor prior to the date of the assignment, then by the assignment the assignee took nothing. Likewise, as I understand, it is agreed between counsel,—and if not so agreed it is clearly true,—that the question of limitations here turns on the six-years statute of New York.

The Soviet Government was recognized by the political branch of our Government and the assignment was made by it to the United States on November 16, 1933. The consequence is that the question of limitations turns on whether or not the statute had been kept running, or it continued to run, for a period of six years preceding that date. That is to say, it must have started to run as early as 1927.

The Imperial Russian Government was overthrown and the Kerensky regime took charge of the Government of the

Russian State in March, 1917. Our Government recognized the Kerensky Government in that month. That recognition continued without interruption down to November 16, 1933. The Soviet Revolution occurred in November, 1917. The [fol. 418] Soviet Government was not recognized by our Government until November 16, 1933.

There are two officials with whom we are particularly concerned in this case. One is Bakhemeteff and the other is Ughet. For the moment I shall disregard Ter-Assatouroff.

Bakhemeteff was recognized by our Government as Ambassador from the Russian State on July 15, 1917. He continued to be so recognized until June 30, 1922, when he resigned. He was absent from the United States, in attendance on the Peace Conference in Paris, from December 3, 1918, to July 31, 1919.

Ughet was recognized by our Government as the representative of the Ministry of Finance of the Imperial Government on January 2, 1917. He was appointed Financial Attache by the Kerensky Government in April, 1917. In that month he was recognized as such by our Government. His recognition by our Government in that capacity continued without interruption down to November 16, 1933. During the period from December 3, 1918, to July 31, 1919, Ughet was also recognized by our Government as Chargé d'Affaires of the Russian State. Between June 30, 1922, and November 16, 1933, he acted as Financial Attache and Custodian of Russian property in the United States. He was accorded diplomatic status by our Government and was recognized during that period as the sole representative in the United States of the Russian State.

The account in suit between the defendant and the Russian State at some time prior to November, 1917, had a bank credit of approximately five million dollars, owing by the [fol. 419] bank to the Russian State. Subsequent to the Soviet Revolution there were no accretions to or withdrawals from that account, except that between that revolution and February 25, 1918, there were a few credits of additional bank interest.

On December 27, 1917, the Soviet Government made a decree confiscating to itself all credits in Russian banks. At that time the defendant claims that it had to its credit in Russian banks something like nine million dollars. That nine million dollars was confiscated by the Soviet Government, and, as I understand the decree, the Soviet Govern-

ment undertook in that confiscation decree itself to carry in the bank of the Russian State the credits the defendant then had in Russian banks in the sum of approximately nine million dollars.

At the time of the confiscatory decree, when the Russian State had to its credit with the defendant the five million dollars, certain Russian banks had to their credit with the defendant sums, carried in separate accounts, which aggregated about $2,226,000. The two added together approximated $7,226,000. The consequence is that, as of that date, assuming that the amount owing by the defendant to the Russian State and the amount previously owing by the defendant to Russian banks were set off against the amount owing to the defendant originally by banks in Russia taken over by the Russian State, the overplus left owing to the defendant would be approximately a million and three-quarters dollars. That, according to the claim of the defendant, is a balance which, as the result of the consolidation of the accounts and the set-off, remained owing as of that date to the defendant.

Two actions taken by the defendant bank with respect [fol. 420] to the $5,000,000, the bank deposit credit involved in this suit, are undisputed. The first is that on February 25, 1918, the bank applied that balance as against the $9,000,000 which it claimed was owing to it and made entries to carry out that application, so that on its books in this particular deposit account there was nothing whatsoever left owing to the Russian State. The second is that on March 14, 1918, the directors of the bank approved the action of its officers theretofore in closing the deposit account involved in the present suit in the way I have described.

There is no controversy between the parties that such action on the part of the bank would not be sufficient to set the statute of limitations running unless then, or if later, as of such subsequent date, in order to initiate the running of the statute of limitations, there were notice given to an authorized representative of the Russian State. The defendant contends that long preceding 1927 it gave to the Russian State notice of unequivocal repudiation of liability; also that such notice was given both to Bakhmeteff and to Ughet at several different dates, all of which preceded June 30, 1922. If so, and those notices were effective, then plainly they were given a sufficient length of time ahead of the assignment to the plaintiff of the account in suit on Novem-

ber 16, 1933, for the six-years statute completely to have run.

The defendant also contends that there was no suspension of the running of that period of limitation after it had commenced to run.

As I have indicated heretofore, I shall omit for the moment any discussion of Ter-Assatouroff or of notice to him or [fol. 421] of his status. In consequence, the substantial controversies are three in number.

As I have said, it is indisputably shown that the defendant bank did outright and unequivocally repudiate liability as early as February 25, 1918. Though this be not conceded by the plaintiff, it is established by the evidence without dispute. I regard it as plain that actual, unequivocal repudiation of liability occurred as early as February 25, 1918.

Accordingly, as I see it, the three questions are, first, whether notice of such repudiation was given; secondly, if so, whether it was given to a representative of the Russian State in such manner as to bind the Russian State; and, thirdly, if the statute started running on that notice being given, whether it was suspended before the six-years period had elapsed. The answer to these questions turns on issues both of fact and of law.

Let us now examine the facts. Is there a triable issue of fact? Or are the facts, insofar as they are material or it is essential for them to be determined, without serious or substantial dispute?

In discussion I shall deal, first at least, with instances relating to or resting on the consolidation of the accounts between the bank and the State of Russia, including the taking of the setoff by the bank; that is to say, in considering the matter of notice at this stage I shall deal with such instances.

As I have already indicated, it is conceded by the defendant that, in order to set limitations running by means of repudiation of liability, the repudiation must be unequivocal. It follows that notice must be of a repudiation of liability that was unequivocal.

[fol. 422] Save as a background, I shall disregard the negotiations and transactions which preceded February 25, 1918. It is probable that none of them constituted unequivocal repudiation of liability, though it is not necessary at the moment definitely to determine that question. An illustration, and I believe a fair illustration, of the occurrences preced-

ing February 25, 1918, was the Sabin letter to Ughet of December 12, 1917. In that letter Mr. Sabin said that for the present the bank would continue to hold the deposit balance as now. That, as it seems to me, was not an unequivocal denial of liability by the bank.

Was notice of unequivocal repudiation of liability given by the bank on or after February 25, 1918? There are two instances of notice to Bakhmeteff and four of notice to Ughet after that date, which I shall discuss. I may say in the beginning, however, that I am persuaded by the proof that such notice of unequivocal repudiation of liability was given by the bank both to Bakhmeteff and to Ughet. I see no escape from reaching that conclusion; nor do I see any substantial or serious dispute in the testimony on that issue.

Let us now take up Bakhmeteff.

As I see it, the oral testimony of Bakhmeteff himself is definite and without dispute that such notice was given to him. Moreover, the testimony which I have in mind in making this finding shows notice that the accounts had been consolidated and a setoff had been taken by the bank. Mr. Polk, at the instance and request of Mr. Bakhmeteff, sought information as to the position of the bank. Bakhmeteff says unequivocally and plainly that he knew that the bank [fol. 423] had refused to surrender. He unambiguously says, further, that he knew that the bank had taken the setoff.

It would have been strange indeed if Bakhmeteff had not known of the setoff. He testified that he was in constant contact with Ughet. As will soon be seen, Ughet knew that the setoff had been taken and payment refused. Bakhmeteff did not look after details. He left those to Ughet. He dealt through Ughet. It would have been almost beyond belief if he had testified,—and he has not testified,—that Ughet never conveyed to him the information that a setoff had been taken.

The efforts of Mr. Polk to get the bank credit available for uses of the Russian State under the direction of Bakhmeteff were made at the instance and request of Bakhmeteff. Moreover, it is uncontroverted that Mr. Polk informed Bakhmeteff that his efforts had resulted in failure.

Next, did the notice come to Bakhmeteff as early as 1927 or earlier? True, in his testimony he says that he thinks that Mr. Polk gave him this information in 1917 or 1918. The probability, from the proof, is that the information of

the repudiation was given to him by Mr. Polk preceding December 3, 1918, when he left this country to go to Paris. However, certainly it was given to him preceding June 30, 1922, because he says squarely that he knew it as Russian Ambassador and he ceased to be Russian Ambassador on that date.

So through the first batch of proof I have mentioned it seems to me conclusively established that preceding June 30, 1922, Bakhmeteff had notice of outright repudiation of liability by the bank.

[fol. 424] Second, an unambiguous piece of proof of notice of repudiation, notice of repudiation because the setoff had been taken, is contained in a letter of September 23, 1921, from Murray to Bakhmeteff. At the instance of Mr. Bakhmeteff, Mr. Murray, of counsel for the Russian Embassy, had undertaken negotiations,—not the first negotiations it should also be noted,—to get the bank balance available for the Russian State under Bakhmeteff's representation of that State. It is not necessary to go into the details of these, because counsel, as the result of his efforts, failed again, as Mr. Polk had failed and as Mr. Ughet had failed, to get the money available for Bakhmeteff, and Mr. Murray by that letter of September 23, 1921, definitely so informed Bakhmeteff.

As I have heretofore said, in the case of Ughet there are four separate pieces of proof which convince me that he also had the same type of notice, definite and unequivocal notice, of repudiation of liability by the bank and had that notice preceding June 30, 1922.

The indications are that all of those four instances occurred during the period when Ughet was Chargé d'Affaires. If so, they were given when he stood in the place of the Ambassador. I am not perfectly certain, however, as to one of those instances. Nevertheless, it is clear beyond peradventure that at least some of those notices were given to Ughet during the time he was Chargé d'Affaires.

The first notice given to Ughet, which is indisputably established, was by Breton. He informed Ughet that the bank [fol. 425] refused to transfer the account because it had taken it as a setoff. That was probably prior to May 7, 1918; but if not so early, then it was certainly prior to June 15, 1919. That is an instance that may or may not have occurred during the period when Mr. Ughet was Chargé d'Affaires. The reason I say that notice was probably

prior to May 7, 1918, is that, under that date, Penny, an official of the Federal Reserve Bank of New York, sent a letter to the Treasury Department at Washington in which he recited this notice of repudiation as having been given by Breton to Ughet.

The second instance was at the socalled Fulton conference, in Fulton's office. At that time a Protective Committee, of which Fulton was chairman, was seeking to secure the bank credit to be applied towards the payment of principal of a loan made to the Imperial Russian Government in 1916 by American banks in the sum of $50,000,000. Ughet attended the conference. At the conference Stanley stated, in the presence of Ughet, that Ughet had previously known that this bank credit was not available for use of the Russian State, because the Russian Government owed the defendant bank a sum in excess of the $5,000,000. The principal of the loan matured June 18, 1919. The conference appears to have been held on June 16, 1919. It is immaterial, however, to discuss on which of the two dates the notice was given. It is clear that it was given on or prior to June 18, 1919. What Stanley says he announced to Ughet at the conference is corroborated by the testimony of Sargent, who was present.

I discover nothing in the affidavits of Ughet to contradict [fol. 426] what was described by both Stanley and Sargent as having occurred at the conference with respect to his, Ughet's, request; that is to say, the suggestion that the bank credit be made available to him and Stanley's reply to him that he knew preceding the conference that the money was not available because the Russian Government owed the bank a sum considerably greater than the amount of the bank credit.

The third instance of notice, as I see it, was established out of the mouth of Ughet, and that is what he said in his letter of July 1, 1919, to Murray. In that Ughet said to his own counsel that because of the seizure of the bank's credits,—meaning, evidently, by the confiscation decree,—the defendant bank had refused to pay the bank credit of $5,000,000. As I see it, that is an express admission in writing by Ughet that on or prior to July 1, 1919, the bank had unequivocally repudiated liability.

The fourth instance to which I shall refer has to do with the $1,625,000 instalment of interest on the $50,000,000 Russian loan which fell due July 10, 1919. The letter of Ughet

dated July 1, 1919, addressed to Fulton, Chairman of the Protective Committee, was a request by him to seek use of the bank credit with the defendant, to meet that instalment of interest. The letter was, in substance and effect, not only an authorization to Fulton on behalf of Ughet, but a request to him, to do what in law amounts to a demand for the turning over by the defendant bank of the $5,000,000 deposit account.

Fulton made the effort in accordance with the request. [fol. 427] His letter of July 3 shows that he transmitted direct to Sabin, the president of the bank, a copy of the letter of July 1 from Ughet to him. Mr. Sabin's letter of July 10 to Mr. Fulton was a refusal to comply with that request. In the letter of July 10 of Sabin to Fulton, there was enclosed copy of a letter which Sabin had sent to Polk under date of June 9, 1919. In that letter of June 9 Sabin had set out the reasons of the bank for not turning over or rendering available the bank credit. One of those reasons, embodied in the June 9 letter, was that the bank had taken over the $5,000,000 as a credit on the larger amount owing to it by the Russian State. It was plainly claimed in the June 9 letter that the Russian Government was indebted to the bank, rather than that the bank was indebted to the Russian Government.

On July 11, 1919, Mr. Fulton sent a letter to Mr. Ughet in which he informed him of his failure in the effort which he had made, at the instance of Mr. Ughet, to procure or to get available the bank credit. It is true that it does not appear that in the July 11 letter Mr. Fulton enclosed to Mr. Ughet a copy of Mr. Sabin's letter of June 9 to Mr. Polk. As it seems to me, however,—branching off for a moment a little bit,—proof that Ughet saw the June 9 letter is needless to a decision of this case. His failure to see the letter does not change the situation. The notice he did get of the bank's refusal to pay was unequivocal,—whatever the reason; whether because the bank had taken the setoff or because of something else. It was an unambiguous refusal. Moreover, in the letter from Mr. Ughet to Mr. Murray of [fol. 428] July 1, to which I have already referred, Mr. Ughet said to Mr. Murray that the bank had refused to make the payment because of the seizure of its funds in Russia.

I cannot see, therefore, why or how, after putting together all the proof with respect to the interest instalment

in the month of July, 1919, it can possibly be said that Ughet was ignorant of the refusal or of the grounds on which the bank had refused the request of Mr. Fulton that the bank credit be rendered available to the Russian Government.

If I be correct, it follows, and from the evidence recited it follows, that prior to June 30, 1922, both the Ambassador himself and the Chargé d'Affaires knew that the bank had unequivocally repudiated liability on the deposit account.

Now what are the Government's contentions? Why does it say that there is a triable issue?

First, attention is called to the fact that at one place in his testimony Ughet said that no demand had been made on the defendant bank to pay the amount of the deposit. As I see it, however, that statement by Mr. Ughet is a mere conclusion of law. He does not deny any of the various transactions or the various conversations to which I have called attention. He does not dispute them. Nor does he say that any of the letters to which I have referred were not genuine. The mere contention that what happened did not constitute a demand, therefore, does not controvert the substantive facts, indisputably established, and is of no significance whatever. Moreover, even if it were true that Ughet made no demand, that also would not at all controvert, what is established by the proof, that the bank re- [fol. 429] pudiated liability unequivocally and gave notice of that repudiation to Ughet, as well as to Bakhmeteff.

Secondly, the Government calls attention to a statement by Ughet in his testimony that he believes that Ter-Assatouroff was mistaken in some of his statements. Up to this time I have not relied on the testimony of Ter-Assatouroff to sustain any of the findings of fact which I have made.

Thirdly, the Government says that in the testimony there is absence of precise dates and that the language employed by the witnesses is in terms of generality.

It would be rather remarkable if witnesses testifying so long after the event, as in this case, were able, without resort to documents to refresh their recollections, to fix dates with precision. That, however, does not mar or diminish the value of their testimony, because, with respect to dates, the chief concern is to find whether the occurrences were prior to 1927. The proof, in all instances, so far as I can see, does establish dates approximately and, in the way I have indicated, it is made clear that the transactions on which I have relied for my conclusions of fact all oc-

curred prior to June 30, 1922. We need not resort to other circumstances to fix precise dates, provided the proof is clear, as it is clear, as to the pertinent date.

So also it would be remarkable if witnesses could remember the exact words used in conversations which occurred years ago. I discover no lack of clarity in their statements of the essence of what those conversations were. They have furnished such clarity.

[fol. 430] With respect to the conversations, the statements of the witnesses deal with substance rather than with precise words. That, as I see it, is the sole basis for the contention of the Government that the words employed were general. Moreover, as I have already pointed out, there is documentary evidence which adequately sustains the repudiation and the notice of the repudiation to the representatives of the Russian State.

Fourthly, the Government has called attention to the fact that the bank assigned other reasons than taking the setoff as grounds for refusing payment. Well, assume that a wrong reason was assigned by the bank for its refusal. As I view it, that would not in the slightest impair its unequivocal nature. Manifestly it was unequivocal if expressed in unambiguous terms.

What the Government relies on chiefly, as I understand, is that the bank at times had employed as a reason for not making the account available to the Russian State absence of the signatures of two of the six persons whose names appeared on the list furnished to the bank at or about the time of the establishment of the account in 1916. Nevertheless, it is perfectly plain from the proof that there were several instances in which Mr. Sabin gave as a reason lack of authority of anybody to draw a check on the bank for the amount. If we assume for the time being that the communications of Mr. Sabin are properly to be construed as predicating refusal of the bank to pay on absence of the signatures of two names on the original list, yet, as I say, in the same communications, or at least some of the same communications, he further assigned the taking over of the [fol. 431] balance as an offset as another reason for refusal to pay. It does not make any difference whether lack of signatures was an additional reason or whether it was an erroneous reason. He assigned also a reason which is consistent with and, indeed, is the very reason on which

the bank insists today, namely, that the bank had taken the $5,000,000 credit as a setoff.

As I feel, therefore, I must conclude, as I do conclude, from the evidence that, without dispute, it is established:

First, that the defendant bank unequivocally repudiated liability prior to June 30, 1922.

Second, that the basis or one of the bases of that position or action taken by the defendant was that it had consolidated, as it claimed the right to consolidate, the accounts, including the accounts of what the Russian banks owed to the defendant before confiscation and the account which it owed to the Russian State; that thereby it had applied the $5,000,000 credit as a setoff; and that this action on its part left a balance actually owing to the defendant.

Third, that prior to June 30, 1922, inquiries had been made of the bank or demands had been made on it by representatives of Bakhmeteff, at his instance or request, and by Ughet himself, as well as by others acting at his instance and request, that the $5,000,000 balance be paid over to the Russian State.

[fol. 432] Fourth, that to Ughet and to all the representatives making such inquiries or demands the bank unequivocally replied that it repudiated liability.

Fifth, that these repudiations were known or communicated, at or about the time of their occurrence, and all prior to June 30, 1922, both to Bakhmeteff and to Ughet.

Sixth, that at the times when they were communicated to Bakhmeteff, as well as the times he made the several inquiries or demands through his representatives, he was recognized by our Government through its political department as the Ambassador in this country of the Russian State.

Seventh, that at some of the times, which so far as I can discover were at all the times save perhaps on one occasion, when Ughet made similar inquiries or demands of the bank himself, individually or through his representatives, he was Chargé d'Affaires and that at all the times he was the Financial Attache of the Russian State.

Eighth, that at all these times the political branch of our Government recognized the Kerensky regime as the Rus-

sian State and recognized that Bakhmeteff was its Ambassador at all the relevant times and recognized Ughet, either as Chargé d'Affaires or also as Financial Attache, as the diplomatic representative of the Russian State.

That brings us to the law questions.

Some of these are novel. Careful research of counsel has indicated that there are not available, or at least they [fol. 433] have not discovered, precise controlling decisions of them by the Supreme Court of the United States or by the Circuit Court of Appeals for the Second Circuit.

I assume, as matter of course, that in a case of this importance there will be an appeal. If so, it would be useless for me to enter into any considerable discussion of the law applicable. That would be of no assistance to either of the appellate courts. As matter of fact, I think about all that my decision of this case amounts to is that it determines who shall print the appeal papers.

Moreover, there is another feature which is worth noting. On the fact side this case carries with it no presumption of the correctness of my findings, because the evidence is in the shape of affidavits or depositions. Each appellate court in passing on the papers, therefore, will be in identically the same position as the trial court.

For the reasons given I shall not go into very much discussion of the authorities or indulge in extended comment on the propositions of law.

The first question is, was the notice of repudiation to the Russian State sufficient to start the statute running?

That notice, as I have found as a fact, was given to both Bakhmeteff and Ughet. At the time notice was given to those gentlemen they were recognized by our State Department as diplomatic representatives of the Russian State. That action by the political branch of the Government prevents the court from inquiring whether, indeed, they were proper representatives of the Russian State.

Even though there be no exact decisions on the point we [fol. 434] are now dealing with, I think plainly that answers to inquiries made by Bakhmeteff or Ughet, or made at the instance of either through his representative and communicated to him, are entirely sufficient to set the statute of limitations running. I feel that I should go contra to the Lehigh Valley case, 21 Fed. 2nd, as well as to numerous other controlling authorities, if I should fail to treat

both Bakhmeteff and Ughet as fully and completely authorized to speak and act for the Russian State. I cannot go into inquiries about the different governments or the different political factions which were in control in Russia. The courts to which I owe obedience have definitely so determined that question. I am bound by their determinations.

Inasmuch as the diplomatic representatives of the Russian State, recognized by the political branch of our Government, so far as concerns matters or property in the United States, were in a sense the Russian State, as I see it, notice to them was notice to the Russian State itself.

Moreover, although those who made inquiries of the bank were merely acting at the request of the diplomatic representatives of the Russian State, as I see it, an unequivocal response by the bank to those inquiries that it repudiated or denied liability was of itself sufficient to start the statute running. This is clearly true in principle. I incline to feel that the Tillman case, 253 N. Y., goes far to sustain, if indeed it does not squarely sustain, the holding that notice of repudiation given to a representative who had been delegated by the diplomatic representative of the foreign state to make the inquiry was enough, in and of [fol. 435] itself, to start the statute running. In other words, the delegation of authority to an agent on behalf of the diplomatic representative to make the inquiry carried with it authority on the part of that agent to receive the answer.

It is settled by controlling decisions, and is not denied, that the recognized diplomatic representative of the Russian State had authority to sue the bank in our courts for the recovery of the deposit now under consideration. We have had discussion as to whether authority to sue is a sufficient test of authority to receive notice. Research of counsel has not produced any exact decision determining the question. I incline to think that probably, however, it is enough. As our courts have established beyond peradventure the authority of either Bakhmeteff or Ughet to sue, if I be correct in believing that authority to sue carried with it likewise authority to receive notice, then, under the finding of fact I have made, notice which was given to Bakhmeteff or Ughet, during periods when they were recognized by our Government as the diplomatic respresentatives of

the Russian State, was entirely sufficient to start the statute of limitations running.

I have already mentioned the contention made with respect to absence of signatures of two out of the six whose names were contained on the list, as of the date the account was established, as authorized to draw on the account. I think that, with respect to the issues in this case, all of that is wholly immaterial.

In the first place, as has been held by the Court of Appeals of New York in the Vladikavkazsky case, 263 N. Y., [fol. 436] that such an arrangement was revocable. Moreover, as I read them, it is established by the decisions of the Federal courts that, by virtue of the fact that he was Ambassador and had the power to sue, Bakhmeteff (or, when he was in charge, Ughet) could entirely override or render valueless, as between himself and those persons whose names appeared on the list, any authorization given or attempted to be given at the time to those agents named on the list when the account was established. In other words, as I see it, authority on the part of the Ambassador completely to control the situation with respect to signatures of checks or drawing out of funds from the bank follows, as a corollary, from the indisputable authority he had to control suits in the courts of the United States, in behalf of the Russian State, for the recovery of the bank deposit.

Again, at the time the list was made up, those whose names appeared on it were employees of the Ministry of Finance. It is indisputably established that long prior to February 25, 1918, all those six had ceased to be employees of the Russian State. Whether, therefore, originally they had authority which was exclusive, or whether or not so long as they were employees the Ambassador could not properly override them, when they ceased to be employees at all, the power which had been conferred on them as employees of the Russian State necessarily ceased. It cannot be that after the authorization to them became ineffective, there was nobody authorized on behalf of the Russian State to sue, or on behalf of the Russian State to receive notice, or on behalf of the Russian State to give a good receipt. Control of the account having passed prior to February [fol. 437] 25, 1918, to the Ambassador of Russia, recognized by the political branch of our Government, under the decisions, as I construe them, he not alone had authority

to bring suit, but he had authority to receive notice and had authority to give a good receipt if the bank had yielded to his request.

Another circumstance bearing on the immateriality of the signature list is that in this case a demand was not necessary in order to start the statute of limitations running. Hence, it follows that presentation of a properly signed check cuts no figure. In my disposition of the case I have dealt only with repudiation and it is conceded, as matter of law, that if there was repudiation,—and that is shown without dispute,—and if there was due notice to the depositor,—and I have found that there was,—those two things were enough to set the statute of limitations running.

The second law question which has been discussed is whether the statute runs against a foreign sovereign.

As to that, as well as to some other matters, the research of counsel has not, as I see it, produced a ruling authority which is exactly in point. What court decisions have been produced which deal with analogous situations, however, seem to me, in principle, to show that the statute of limitations does run against a foreign sovereign.

The only reason assigned by the Supreme Court in the Saratoga Vichy case, 191 U. S., for the statute of limitations not running against the local sovereign is that public policy prevents or stands in the way. The Supreme Court gives but a single reason why this is so. The Court says the doc- [fol. 438] trine "is based upon the assumption that the officers of the government may be so busily engaged in the ordinary affairs of state as to neglect a vindication of its interests in the courts."

As I see it, that reason has no application to a foreign sovereign. It seems to me that it would be monstrous, as matter of public policy, with respect to foreign states which come within our territorial limits and carry on business transactions, including, for example, the making of deposits in banks, to declare that such banks should be held in uncertainty and be denied opportunity to set up as a defense lapse of time, after they had repudiated liability, as a defense. There may be good reason, as matter of policy, why there should be disallowance of the defense as against the local sovereign; but I fail to see any reason why the same should be true so far as concerns a foreign sovereign. On the contrary, it seems to me that there is every reason of policy why it should not be true as to a foreign sovereign

which has come into our country and made a deposit in one of our banks. Moreover, as I see it, to deny an American bank the benefit of the running of the statute of limitations as against a foreign sovereign would be to deprive the bank in its transactions, as between itself and the foreign sovereign, of an absolute right which it has as against other depositors. The tendency of that, it seems to me would certainly be contrary to the public policy of this country as announced in the Fifth Amendment.

The fourth question is, did the United States own or have a legal interest in the bank deposit?

If during the period we have had under discussion, long preceding 1933, the local sovereign had owned the account, [fol. 439] it is conceded that the statute would not have run against it; but I have heard not the slightest proof that the United States owned or had any interest whatever, that is, any legal interest, in the bank deposit, certainly prior to Ughet undertaking to transfer it in August, 1933, and probably prior to the Soviet Government undertaking to transfer it in November, 1933.

All that the proof shows is that, preceding either date officials of two of our Government's departments endeavored to assist the Russian Ambassador and the Financial Attache in getting the bank to turn over the deposit to those officials of the Russian State and that assurance had been given to those departments by the diplomatic representatives of the Russian State, then recognized by the United States, that if they got the money it would be applied towards the payment of Russian debts owing to American commercial concerns and possibly to some small extent owing to the Government of the United States. That, however, vested no ownership of the account in the United States; nor did it establish any interest, that is, any legal interest, in the account in the United States.

It may be that both the State Department and the Treasury Department were anxious to have the bank turn over the funds to the Russian diplomatic representatives recognized by the State Department. If so, as I see it, that would have been a very worthy attitude on the part of our Government officials; but all that happened was that, accepting the assurance of the Russian officials as to the use which would be made of the funds in event the Russian State could get hold of them, both the State Department and the Treasury Department were active,—perhaps more active than they

[fol. 440] otherwise would have been,—in their effort to accomplish the wishes of the diplomatic representatives of the Russian State.

I do not see any basis here for any dry trust. There was no trust at all, dry or otherwise.

The fifth question is whether Soviet recognition was retroactive to the extent of nullifying what had previously happened in regard to the bank account.

Even as to occurrences during the period when the Kerensky Government was recognized as the Russian State by the political branch of our Government, I am inclined to think that, under the authorities it has not been determined squarely yet that recognition of the Soviet Government carried back to the date of coming into being of the revolutionary government so recognized save as to acts done or property located within the territorial limits of the revolutionary government so recognized. I am inclined to think that, so far as concerns intra-Russia transactions, the doctrine of retroactivity applies. Whether or not, however, that has been authoritatively ruled, I am persuaded that it should be the law. On the other hand, in principle at least, as I read the decisions, it is established that recognition does not, under the doctrine of retroactivity, destroy a perfected or completed act or right which has occurred or come about within the territorial limits of the United States. This would seem to be particularly true as to such an act or right of an American in a transaction which he had had prior to that recognition. Otherwise put, I feel that, our Government having said to its own citizens that the Russian State was represented, and properly represented, by an Am-
[fol. 441] bassador other than the one coming from the newly-recognized revolutionary government, I think the doctrine would be monstrous if, subsequent to reliance on the political branch of our Government having publicly assured the citizens of the United States that an individual whom our Government recognized as constituting, so far as we were concerned, the foreign state, the courts of the United States, dealing with what in the meantime had happened in this country, should take it upon themselves to say that, notwithstanding that recognition during that long period, so far as concerns what happened during that period, later recognition of a different revolutionary party in

the foreign state would retroact in its effect to such an extent that it would destroy what had happened while citizens had acted on the faith of what their own government had done.

The sixth question is whether there was some interruption or suspension of the statute of limitations after it started to run. I see not a shadow of proof to support the contention that there was.

I must conclude, therefore, that prior to recognition of the Soviet Government and prior to the assignment, the six years statute of limitation had run and that it had completely barred, in favor of the bank, the cause of action sued on.

Heretofore I have denied the motion of the Government to strike out the Bakhmeteff and Ughet depositions. It follows from what I have said this morning that the motion of the defendant to dismiss the complaint, because of the bar of the statute of limitations, must be granted.

Settle order on two days' notice.

Dated, October 13, 1936.

Francis G. Caffey, United States District Judge.

[fol. 442] In United States District Court

[Title omitted]

Order Dismissing Complaint on the Merits—November 2, 1936

The above-named defendant having moved for judgment dismissing the complaint on the ground that the cause of action alleged therein did not accrue within the time limited by law for the commencement of an action thereon, and said motion duly coming on to be heard in this Court on October 5, 6, 7, 8, 9 and 13, 1936,

Now, upon reading and filing defendant's notice of the said motion dated October 21, 1935; the summons and complaint; the order of this Court dated April 30, 1935, for the taking of the depositions of Boris Bakhmeteff and Serge Ughet; the depositions of Boris Bakhmeteff and Serge Ughet both verified September 19, 1935; the affidavits of Dimitry G. Ter-Assatouroff and Nicholas S. Karinsky both verified October 7, 1935, of Harold Stanley, Charles Sar-

[fol. 443] gent and George B. Link all verified October 18, 1935, of Stuart H. Patterson and William C. Cannon both verified October 17, 1935, of Samuel W. Reyburn and Arthur B. Hatcher both verified September 25, 1935, of George J. Kenny verified October 10, 1935, of Rodney Dean verified October 15, 1935, of C. A. McKeon verified October 16, 1935, of Arthur J. Carey verified October 9, 1935, of Eugene W. Stetson and Grayson M.-P. Murphy both verified February 25, 1935, of Albert Breton verified December 24, 1935, of J. Paul Huber verified January 27, 1936, of Dimitry G. Ter-Assatouroff verified December 16, 1935, of Grayson M.-P. Murphy, John Watts and Ralph M. Carson all verified February 13, 1936, and of Conrad deSahmen verified September 14, 1936; the papers described in and annexed to said depositions and affidavits and numbered Exhibits 1 to 34 inclusive; and the assignment by Serge Ughet as Russian Financial Attache and Custodian of the property of the Russian Government in the United States to the United States executed August 25, 1933, and certified by the Department of State of the United States on December 24, 1935—all submitted by the defendant in support of the said motion;

And upon reading and filing the affidavits of Dimitry G. Ter-Assatouroff verified November 22, 1935, of Boris Brasol verified November 25, 1935, of Serge Ughet verified November 7, 1935, and December 12, 1935, of Mahlon B. Doing verified January 15, 1936, of Henry Munroe verified January 16, 1936; the papers described in and annexed to said affidavits; the order of this Court dated December 17, 1935, for the taking of the deposition of Mahlon B. Doing; [fol. 444] the letter from the Secretary of State of the United States to the Attorney General of the United States dated November 21, 1935, together with the list of documents attached to said letter and described in an annex thereto; the letter from the Acting Secretary of the Treasury to the Attorney General of the United States dated August 27, 1935; and the note from the United States Charge d'Affaires ad Interim at Moscow, U. S. S. R., to the Secretary of State of the United States, dated December 11, 1935, together with enclosures numbered 1 and 2 described therein and annexed thereto—all submitted by the lpaintiff in opposition to said motion;

And after hearing Messrs. Davis Polk Wardwell Gardiner & Reed, attorneys for the defendant (John W. Davis,

Esq. and Ralph M. Carson, Esq. of counsel), in support of said motion, and Hon. Lamar Hardy, United States Attorney (Francis H. Horan, Esq. and Leon E. Spencer, Esq., Assistant United States Attorneys, and Henry Munroe, Esq., Special Attorney, Department of Justice, of counsel), in opposition thereto, and due deliberation having been had,

It Is, upon motion of Messrs. Davis Polk Wardwell Gardiner & Reed, attorneys for the defendant, and upon filing the opinion of the Court,

Ordered that defendant's said motion to dismiss the complaint be and hereby is granted in all respects and the complaint is hereby dismissed upon the merits, and that the Clerk of this Court be and hereby is directed to enter judgment accordingly.

Francis G. Caffey, U. S. D. J.

[fol. 445] In United States District Court, Southern District of New York

L. 59, p. 80

United States of America, Plaintiff,

against

Guaranty Trust Company of New York, Defendant

Judgment Entered November 6, 1936, Dismissing Complaint

The above-named defendant having moved pursuant to the Conformity Act 28 U. S. C. § 724, the Civil Practice Act of the State of New York § 307, and Rules 107 and 120 of the Rules of Civil Practice of the State of New York for judgment dismissing the complaint on the ground that the cause of action alleged therein did not accrue within the time limited by law for the commencement of an action thereon, and said motion duly coming on to be heard in this court before Hon. Francis G. Caffey, United States District Judge, on October 5, 6, 7, 8, 9 and 13, 1936, the defendant appearing by Davis Polk Wardwell Gardiner & Reed, its attorneys, by John W. Davis, Esq. and Ralph M. Carson, Esq., and the plaintiff appearing by Hon. Lamar Hardy, United States Attorney, by Francis H. Horan, Esq., Leon E.

Spencer, Esq. and Henry Munroe, Esq., and the defendant having been heard in support of the motion to dismiss and [fol. 446] the plaintiff having been heard in opposition thereto, and the Court after due deliberation thereon having granted said motion in all respects by order signed November 2, 1936.

Now, on motion of Davis Polk Wardwell Gardiner & Reed, defendant's attorneys, it is

Ordered and Adjudged that the complaint herein is hereby dismissed upon the merits.

Charles Weiser, Clerk.

Judgment entered this 6th day of November, 1936.

[fol. 447] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

United States of America, plaintiff, by its counsel, now comes and says that on the 6th day of November, 1936, this Court signed and entered its judgment in favor of the defendant and against the plaintiff dismissing the complaint on the ground that the cause of action alleged therein did not accrue within the time limited by law for the commencement of an action thereon, in which judgment and proceedings had prior thereto in said cause, certain errors were committed to the prejudice of the plaintiff, all of which more fully appear from the assignments of error filed herewith.

Wherefore, United States of America prays that an appeal may be allowed in its behalf to the United States Circuit Court of Appeals for the Second Circuit, for the cor- [fol. 448] rection of the errors so complained of and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be transmitted forthwith to the United States Circuit Court of Appeals for the Second

Circuit in accordance with the laws of the United States and the rules of this Court.

Dated, New York, N. Y., February 3, 1937.

Lamar Hardy, United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office & P. O. Address, United States Court House, Foley Square, Borough of Manhattan, City of New York.

Now, on the above petition, it is ordered that the appeal as above prayed for be and the same hereby is allowed.

Dated 2/3/37.

Robert P. Patterson, U. S. D. J.

[fol. 449] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the plaintiff, above named, by its attorney, Lamar Hardy, United States Attorney for the Southern District of New York, and in connection with the appeal in the above entitled cause files the assignment of errors which it avers occurred in said cause, and upon which it will urge its appeal therein.

1. The Court erred in granting the defendant's motion for judgment dismissing the complaint on the merits.

2. The Court erred in holding that the question of limitations turns on the six year statute of New York.

3. The Court erred in deciding that the enforcement of the claim of the United States which constitutes the cause of action stated in the complaint was barred by the Statute of Limitations on November 16, 1933.

[fol. 450] 4. The Court erred in holding that the Statute of Limitations runs against a foreign sovereign.

5. The Court erred in holding that the Statute of Limitations ran against the Soviet Government and/or the State of Russia, so as to prevent the enforcement of the claim for which the within action was brought.

6. Assuming that the Statute of Limitations had begun to run prior to 1922, the Court erred in not holding that it was suspended when Boris Bakhmetev resigned as Russian Ambassador on June 30, 1922.

7. The Court erred in holding that the Statute of Limitations barred the enforcement of said claim in the hands of the United States even though the claim may have been unenforcible in the hands of the Soviet Government.

8. The Court erred in not holding that the Soviet Government became the lawful successor of prior governments of Russia as early as November, 1917.

9. The Court erred in not holding that the deposit account for the recovery of which the suit was brought became the property of the Soviet Government in November, 1917.

10. The Court erred in holding that Boris Bakhmetev or Serge Ughet were ever the representatives or agents of the Soviet Government.

[fol. 451] 11. The Court erred in holding that the defendant made an unequivocal repudiation of liability under the deposit account before November 16, 1927.

12. The Court erred in holding that notice of repudiation of liability under the deposit account was given prior to November 16, 1927 to the proper representatives so as to bind the Soviet Government.

13. The Court erred in not holding that de jure recognition will operate retroactively to revive a "remedy" under circumstances where the same was unenforcible prior to recognition.

14. The Court erred in not holding that the record presented such a conflict of material fact in substantial dispute as to raise a triable issue.

Wherefore, plaintiff prays that the said judgment of the United States District Court for the Southern District of New York in dismissing the complaint be reversed.

Dated, New York, N. Y., February 3, 1937.

Lamar Hardy, United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office and Post Office Address, United States Court House, Foley Square, Borough of Manhattan, City of New York.

[fol. 452] Citation, in usual form, omitted in printing.

[fol. 453] In United States District Court

[Title omitted]

Stipulation as to Record

It is Hereby Stipulated and Agreed by and between the undersigned that the foregoing is a true transcript of the Record of the District Court of the United States for the Southern District of New York in the above entitled matter as agreed upon by the parties, and that the Clerk of the District Court may certify the same as correct.

Dated, New York, N. Y., March —, 1937.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Defendant-Appellee. Lamar Hardy, United States Attorney for the Southern District of New York, Attorney for Plaintiff-Appellant.

[fol. 454] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 455] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued June 8, 1937. Decided Aug. 16, 1937

No. 402

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

GUARANTY TRUST COMPANY OF NEW YORK, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Chase, Circuit Judges

From a judgment dismissing its complaint on the ground that the cause of action sued on was barred by the state statute of limitations, the plaintiff appeals. Judgment reversed.

Lamar Hardy, U. S. Atty., of New York City (Leon E. Spencer, Asst. U. S. Atty., of New York City, David E. Hudson, Sp. Asst. to the Atty. Gen., and Henry Munroe, Sp. Atty., and David McKibbin, 3d. Sp. Asst. to the U. S. Atty., both of New York City, of counsel), for the United States.

Davis, Polk, Wardwall, Gardiner & Reed, of New York City (John W. Davis, Ralph M. Carson, and J. Paschall Davis, all of New York City, of counsel), for appellee.

SWAN, Circuit Judge:

This is an action at law by the United States to recover from Guaranty Trust Company of New York the alleged balance of a deposit account. The complaint alleges that on July 15, 1916, the Government of the State of Russia opened a deposit account with the defendant in New York; that on December 12, 1917, there remained in said account $4,976,722.78, and said sum was then, and still is, owing by the defendant, together with interest thereafter accrued; that on November 16, 1933, the Government of the State of Russia assigned all its right, title, and interest in said debt

to the plaintiff; that payment thereof has been demanded by the plaintiff and refused by the defendant. Upon affidavits and depositions before answer, the defendant made a motion to dismiss the complaint under rule 107 of the Rules of Civil Practice of New York and the Conformity Act. 28 U. S. C. A. § 724. The ground of the motion was that the cause of action had accrued to the assignor more than six years prior to the assignment and, therefore, the remedy of the assignee was likewise barred by the state statute of limitations, Civil Practice Act N. Y. § 48. United States v. Buford, 3 Pet. 12, 29, 7 L. Ed. 585. Under the law of New York an unequivocal repudiation of liability by the bank would start the running of the statute as against a private litigant. Tillman v. Guaranty Trust Co., 253 N. Y. 295, 171 N. E. 61. The District Judge found that the defendant had unequivocally repudiated its liability as early as February 25, 1918. On that date the defendant closed the account, charging against it sums which were claimed to be owing to Guaranty Trust Company by the State of Russia as successor under nationalization decrees of banks in Russia whose assets had been confiscated. The District Judge also found that notice of such repudiation was received prior to June 30, 1922, by Ambassador Boris Bakhmeteff and by Mr. Serge Ughet, financial attaché and charge d'affaires, who at the time were recognized by our State Department as the accredited representatives of the State of Russia in this country. Accordingly, the defendant's motion was granted. From judgment dismissing the complaint upon the merits the plaintiff has appealed.

[fol. 456] The question whether a foreign sovereign is affected by a state statute of limitations is one upon which no direct authority has been found. It is, of course, settled law that a state statute of limitations cannot bar the United States. Davis v. Corona Coal Co., 265 U. S. 219, 44 S. Ct. 552, 68 L. Ed. 987. Whether a foreign sovereign might be barred was left open in French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427, at page 437, 24 S. Ct. 145, 147, 48 L. Ed. 247, where Mr. Justice Brown remarked:

"It is said, however, that the doctrine of laches has no application to the neglect of the government to pursue trespassers upon its rights, and that the French Republic is entitled to the benefit of that rule. It is at least open to doubt whether the maxim nullum tempus, applicable to our

own government, can be invoked in behalf of a foreign government suing in our courts. The doctrine is one of public policy, and is based upon the assumption that the officers of the government may be so busily engaged in the ordinary affairs of state as to neglect a vindication of its interests in the courts. Whether this exemption can be set up by a foreign government in the prosecution of suits against our own citizens—in other words, whether the latter are not entitled to the benefit of the ordinary defenses at law—is a question which does not necessarily arise in this case, and as to which we are not called upon to express an opinion."

In United States v. Nashville, etc., R. Co., 118 U. S. 120, 125, 6 S. Ct. 1006, 1008, 30 L. Ed. 81, there is a dictum that the principle of public policy, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided, is "applicable to all governments alike." See, also, United States v. Thompson, 98 U. S. 486, 489, 490, 25 L. Ed. 194. On the other hand, in Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 396, 400 (C. C. A. 2), this court referred to the duty of Mr. Ughet to continue the suits for the State of Russia and to avoid delays "which would give rise to the bar of limitation to sue." If Mr. Ughet had authority to continue a suit on behalf of the State of Russia, as we there held, it seems clear that he would have had authority to commence a suit on behalf of the State of Russia against Guaranty Trust Company after learning of its repudiation of liability on the deposit account. But it does not follow that his failure to do so for a period of six years would operate as a bar against the foreign sovereign. The statement on the subject of limitation in the Lehigh Valley Case was purely dictum.

The defendant relies also upon Western Lunatic Asylum v. Miller, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644, where it was held, on the assumption that the plaintiff and the Commonwealth of Virginia were one and the same, that the suit was barred by the statute of limitations of West Virginia. See, also, United States v. Brown, 247 N. Y. 211, 218, 160 N. E. 13; Commissioners of the Sinking Fund of Louisville v. Buckner, 48 F. 533, 536 (C. C. Ky.). It is argued that there can be no distinction between applying a limitation statute to another state of the Union and applying it to a foreign government, but we are not prepared to

accept this conclusion in view of the complete power over international affairs which is vested in the national government. See United States v. Belmont, 57 S. Ct. 758, 761, 81 L. Ed. —, where it is said that such power cannot be subjected to any curtailment or interference on the part of the several states. If a state Legislature should declare that a particular foreign sovereign could not sue in the courts of the state on claims over one year old, such a declaration of state policy would clearly be an invalid encroachment upon the federal power to recognize such government on the basis of equality with other foreign powers. While the matter is less clear when the state legislation treats all suitors alike, nevertheless any limitation statute, if applied to foreign governments, will impose upon the sovereign vicarious responsibility for the neglect of his agent in the United States promptly to bring suit to enforce his sovereign's right of action. The principle that a sovereign ought not to suffer from the negligence of his officers and servants cannot, we believe, be abrogated by state legislation with respect to a foreign sovereign any more than it can with respect to the United States. See Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. Ed. 534. To declare that the principle is applicable to the United States but not to a foreign sovereign is to accord [fol. 457] to the latter less than full sovereign rights. Whether a foreign government shall be accorded less than full sovereign rights in the United States is a matter pertaining to international relations over which the national government has complete control. It is true that a sovereign who voluntarily comes into a local court must play the role of a litigant like any other suitor, and is subject to a properly assertable defense of set-off or counterclaim. United States v. National City Bank of New York, 83 F. (2d) 236, 238, 106 A. L. R. 1235 (C. C. A. 2). That is a matter pertaining to procedure after the sovereign has sought the aid of the court. Here the effort — to charge the sovereign with responsibility for something which occurred before he sought the aid of the court; namely, his agent's failure to seek it more promptly. The rule as to set-off is not controlling as to the defense of limitation.

In our opinion the state statute is inapplicable to a foreign sovereign and the judgment appealed from must be reversed.

Manton, Circuit Judge, concurs with opinion.

Chase, Circuit Judge, dissents.

[fol. 458] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued June 8, 1937. Decided Aug. 16, 1937

No. 402

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

GUARANTY TRUST COMPANY OF NEW YORK, Defendant-Appellee

Appeal from the District Court of United States for the Southern District of New York

Before Manton, Swan, and Chase, Circuit Judges

MANTON, Circuit Judge (concurring):

This is an appeal by the appellant from a judgment dismissing the complaint on the ground that the statute of limitations of the State of New York ran for more than six years prior to the instituting of the present action.

The action was started on September 22, 1934, by the United States, as assignee on November 16, 1933, of the Government of the Union of Soviet Socialist Republics against the Guaranty Trust Company of New York, for the recovery of $4,976,722.78, with interest thereon from December 12, 1917, representing the balance of a deposit account of the former Imperial Russian Government opened on July 11, 1916, with the appellee.

Appellee claimed, in affidavits in support of its motion of dismissal, that during the years 1918 and 1919 it advised Bakhmetieff and Ughet, the ambassador and financial attaché, respectively, of the Provisional Government of Russia—the so-called Kerensky Government—that it would not pay the deposit account to the Russian embassy, and this refusal was construed by the appellee as an unequivocal refusal to pay, which, in its opinion, brought into operation the six-year period of limitations, thereby barring the present action.

The appellant replied that facts were lacking from which an unequivocal refusal to pay could be inferred, and that

any communications addressed by the appellee to the representatives of the Provisional Government, subsequently to its overthrow in November, 1917, could not be binding upon the present Russian Government.

The court below held with the appellee, and ordered the suit dismissed. From such order this appeal is taken. The Civil Practice Act of New York provides (section 48):

"The following actions must be commenced within six years after the cause of action has accrued:

"1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument."

The question for us to determine is whether the right of the Russian Government to the moneys here involved had been outlawed at the time that government executed its assignment of such moneys to the United States on November 16, 1933.

We are justified in regarding it as axiomatic in our law that a foreign sovereign, without its consent, is not amenable to suit in our courts, and that its property is not subject to their process. This principle springs from considerations of public policy which it is in the interest of one sovereign to observe toward another sovereign who, in legal contemplation at least, is entitled to claim a position of equality. There can be no submission of one sovereign nation to the laws of another, except where such submission is voluntary. Judicial compulsion among sovereign states would be a legal monstrosity which would certainly de- [fol. 459] stroy that perfect equality which is the basis of admission to membership in the international community. This sovereign immunity is so sweeping in character that it extends to all classes of actions, whether in rem or in personam. From this premise it follows that the laws of the local sovereign have no application to a foreign sovereign or his property, when such sovereign has taken no affirmative action to submit to the local jurisdiction. In other words, local laws are not made for the observance of, and the sanctions they carry cannot be construed to contemplate, foreign sovereigns. These general principles are today admitted quite generally. In the case of The Schooner Exchange v. M'Faddon, 7 Cranch, 116, 137, 3 L. Ed. 287, Chief Justice Marshall remarked:

"This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

In United States v. Diekelman, 92 U. S. 520, 524, 23 L. Ed. 742, the Supreme Court said: "His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed."

In England, the courts have taken the same position. In the leading case of The Parlement Belge, [1880] 5 Prob. Div. 197, 214, Brett, L. J., said: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

From time to time English tribunals have had the occasion to adhere to these views. Duke of Brunswick v. King of Hanover, 6 Beav. 1, 49 Eng. Reprint, 724; Mighell v. Sultan of Johore, [1894] 1 Q. B. 149, 153; The Gagara, [1919] Prob. Div. 95 C. A.; The Porto Alexandre, [1920] Prob. Div. 30, C. A. The position of the courts in France (Spanish Government v. Cassaux, Dalloz, 1849: 1-5; Sirey, 1849: 1-81), Germany (French Shares Case, 1928, Annual Digest, 1927, 1928, Case No. 103), the Netherlands (DeBooy

v. German Reich, Annual Digest, 1919-1922, Case No. 84), and Japan (Malsuyama & Sons v. Republic of China, Annual Digest 1927-1928, Case No. 107), is the same.

More recently in United States v. Belmont, 57 S. Ct. 758, 759, 81 L. Ed. —, decided May 3, 1937, the Supreme Court, passing on the very assignment here in question, said: "and the case, therefore, presents a question of public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government. * * * We are of opinion that no state policy can prevail aga-nst the international compact here involved."

And again: "Complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. Compare U. S. v. Curtiss-Wright Export Corp., 299 U. S. 304, 316, 57 S. Ct. 216, 219, 81 L. Ed. —. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consum-ate. And when judicial authority is invoked in aid of such consummation, State [fol. 460] Constitutions, state laws, and state policies are irrelevant to the inquiry and decision."

Is the principle of immunity the same when a local resident asserts an adverse claim, as in this case, against the property of a foreign sovereign which he holds in trust, but which such sovereign does not wish to litigate in the local tribunals? It seems to be reasonably clear that, if there is no legal obligation to submit to the local jurisdiction, then there is no correlative obligation to litigate such claim in the local courts, and that, as long as there is no voluntary submission, the provisions of the local law can have no application. No local statute can be invoked to compel a foreign state to submit to a local jurisdiction. That would be inconsistent with the principle of sovereign immunity. The only recourse available in such cases to the claimant is political and not judicial. U. S. v. Diekelman, supra. While there is no direct ruling upon the question, we find this definite statement in U. S. v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U. S. 120, 125, 6 S. Ct. 1006, 1008, 30 L. Ed. 81:

"It is settled beyond doubt or controversy, upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided, that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations unless congress has clearly manifested its intention that they should be so bound." See Chesapeake & D. Canal Co. v. U. S., 250 U. S. 123, 39 S. Ct. 407, 63 L. Ed. 889.

This statement points to the conclusions that the principle of public policy enunciated in it exempts all governments alike—including foreign governments, undoubtedly—from the application of local statutes of limitations. If it is said that this principle amounts to granting to a foreign sovereign a position of privilege toward residents of the local sovereign, the answer is that such result is inevitable. The political character and extraterritorial privileges admitted in all sovereigns, including our own, necessarily place the sovereign in an exceptional position toward the individual. Local laws, we said, cannot be presumed to contemplate the regulation of the person, acts, or property of a foreign sovereign; so that, without an express engagement by such government to that end, there can be no presumption that he has agreed to submit to the local jurisdiction. Any one, in fact, who deals with a foreign sovereign must be presumed to do so with the implied understanding that the transaction is to be governed by the law of such sovereign and not by a law alien to him and to which he is under no obligation to submit. When we consider the question in the light of international comity, which is a matter between sovereign governments, we may observe that, if the national government permits a foreign sovereign to come or bring his property within our jurisdiction without any other conditions or restrictions than those of a political nature which one sovereign owes to another sovereign, then neither he nor his property lose their extraterritorial privileges and the courts are debarred from enforcing the provisions of the local law as to him or his property. To permit any action against either would be contrary to the principles of international comity. The Gagara, [1919] Prob. Div. 95 C. A. In the case of The Schooner Exchange v. M'Faddon, supra, the Supreme Court said: "A nation would justly be considered

as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of a civilized world."

In the case at bar, it does not appear that the privileges of international comity were denied by our government to the government of Russia at any time. Moreover, in international law the states of the Union pass unnoticed. They do not possess international personality. Our dealings as a nation with other nations must be conducted only through the government of the Union. It is that government which alone possesses the right and power to enter into negotiations with foreign sovereigns and to extend to them the benefits and courtesies customary under the comity practiced between nations. No local political subdivision such as a state of the Union has the right to impair the international comity which it is within the power of the national [fol. 461] government alone to grant to other governments. To permit a state to do so would be to give such state a license to interfere with the general government's conduct of its foreign relations, all of which would be constitutionally unsound and internationally dangerous. If, therefore, both the Soviet Government and its property enjoyed immunity from our laws according to our understanding of the principles and practice of international law and comity, the Soviet Government was not bound by a local statute of limitations and the United States as its assignee took the moneys transferred by such assignment free from the disabilities of the statute.

It has been decided on good authority that, since the diplomatic representative of a foreign sovereign is immune from suit in the courts of the nation to which he is accredited, the running of the statute of limitations in his favor is suspended while he retains his diplomatic status and cannot be brought into court. Masurus Bey v. Gadban et al., [1894] 2 Q. B. 352, C. A. That is to say, his political character has the effect of suspending as to him the application of all local statutes. There is nothing in the law of nations which compels him either to sue or to submit to suit. If he does not submit voluntarily, he cannot claim the benefit of a statute of limitations because he is free from the jurisdic-

tional control of the local sovereign; and the statute cannot be invoked against him because there is no law which requires him to sue. If there is no principle of law requiring him to sue or to submit to suit as the case may be, it is plain that no local statute can be evoked against or by him. If this is true as to the political representative, it is truer still as to his sovereign.

The principle of inapplicability of the statute of limitations has been invoked in arbitration claims.[1]

For these reasons I am of the opinion that the judgment should be reversed.

---

[1] Collac v. Yugoslav State, May 15, 1929, Annual Digest 1929-1930, Case No. 121. Applicant, a Hungarian national, claimed restitution of certain machinery which was seized in August, 1920, by Yugoslav authorities and sold as war booty, or, *alternately*, the payment of an indemnity. Claimant contended that Yugoslav authorities acted contrary to article 250 of the Treaty of Trianon which provided that "the property, rights and interests of Hungarian nationals * * * situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation" in accordance with the provisions of article 232 and the annex to section IV. The respondent State invoked, inter alia, the rule of its municipal law which barred actions brought after the lapse of four years from the taking of property. The tribunal held for the claimant, saying: "Provisions of national laws relating to limitation of actions were capable of application before international tribunals only in so far as they conformed to the provisions of international law or supplemented them. Article 250 of the Treaty of Trianon invoked by the applicant fixed no period limiting the time within which the claims could be brought by virtue of its provisions."

George W. Cook Case, U. S.-Mexico Gen. Claims Com. 1927, Annual Digest 1927-1928, Case No. 174: "There is, of course, no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal."

[fol. 462] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of August, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

UNITED STATES, Plaintiff-Appellant,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 463] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States vs. Guaranty Trust Company of New York. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 23, 1937. William Parkin, Clerk.

[fol. 464] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 463, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States, Plaintiff-Appellant, against Guaranty Trust Company of

New York, Defendant-Appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-eighth day of September, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-second.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 465] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 13, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,047. U. S. Circuit Court of Appeals, Second Circuit. Term No. 566. Guaranty Trust Company of New York, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed November 9, 1937. Term No. 566, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 9 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT.

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

THE BALLOU PRESS NEW YORK

INDEX.

	PAGE
Petition	1
The Action	1
Questions Presented	2
Summary Statement of Matter Involved	2
Reasons why a Writ of Certiorari Should Issue	7
Prayer	10
Brief	11
Opinions Below	11
Jurisdiction	11
Statement of the Case	11
Statutes Involved	11
Specification of Errors to be Urged	13
POINT I. The Circuit Court of Appeals erred in holding that the statute of limitations of the forum does not bar a foreign sovereign suitor therein	13
A. Concededly the United States as assignee of the foreign sovereign's claim is barred if its assignor was barred at the time of the assignment	14
B. The Circuit Court of Appeals erred in applying to a foreign sovereign the principle upon which the local sovereign has heretofore been held exempt from limitations and which in its nature is applicable to the local sovereign only	14
C. The rule adopted by the Circuit Court of Appeals is in conflict with the rule applied in the municipal courts of all other countries and gives foreign sovereigns a privilege which the United States it-	

PAGE

self as a sovereign plaintiff would enjoy in no other country 22

POINT II. The Circuit Court of Appeals erred in holding that the giving of due effect to the Soviet assignment to the United States, required it to disregard the statute of limitations of the forum..... 26

POINT III. The Circuit Court of Appeals erred in disregarding the high public policy which attaches in both municipal and international law to the principle of repose embodied in prescription and limitations.. 28

CONCLUSION 31

Tables.

Cases Cited.

	PAGE
Administration of Siberian Railroads v. Representative of the Supreme Council of People's Economy, Supreme Court, Civil Cass. Collegium, R. S. F. S. R. No. 31, 470 (1924), Coll. of Decisions Civil Cass. Collegium Supreme Court R. S. F. S. R. (1929) No. 40, page 51	23
Armstrong v. Morrill, 14 Wall. 120 (1871)	15
Ash's Estate, In re, 202 Pa. St. 422, 51 Atl. 1030 (1902)	15
Beatrice, The (1866), 36 L. J. Adm. 10	20
Birshenker v. Administrator of State Properties in the Government of Ekaterinoslav, Ruling Senate Civ. Cass. (1879) No. 72	23
Bowers v. New York etc. Lighterage Co., 273 U. S. 346 (1927)	15
Brooklyn Bank v. Barnaby, 197 N. Y. 210 (1910)	28
Cadiz Case, American-Venezuelan Claims Commission of 1885, Moore Int. Arb. p. 4199	29
Campbell v. Haverhill, 155 U. S. 610 (1895)	28
Campbell v. Holt, 115 U. S. 620, 626 (1885)	21
Candler v. Lunsford, 20 N. C. 407 (1839)	20
Cayzer Irvine & Co. v. Board of Trade [1927] 1 KB 269 [1927] A. C. 610	15
Chesapeake & Delaware Canal Co. v. U. S., 250 U. S. 123 (1919)	15
Commissioners of The Sinking Fund of Louisville v. Buckner (C. C. Kentucky 1891), 48 F. 533	17
George W. Cook case, U. S.-Mexico General Claims Commission 1927, Annual Digest 1927-8, No. 174	30
Davis v. Corona Coal Co., 265 U. S. 219 (1924)	14, 15
Dox v. Postmaster General, 1 Pet. 318 (1828)	15
DuPont deNemours & Co. v. Davis, 264 U. S. 456 (1924)	15
Emperor of Brazil v. Robinson (1837), 5 Dowl. 522	20
Fink v. O'Neil, 106 U. S. 272 (1882)	16, 30

PAGE

French Republic v. Government of the Serb-Croat-Slovene Kingdom, July 12, 1929, 2 Hudson World Court Reports 344 20
French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427 (1903) 6, 7, 16
Gathright v. State, 129 Ark. 339, 195 SW 1069..... 15
Gaussen v. U. S., 97 U. S. 584 (1878)..... 15
Gay v. Ruff (1934), 292 U. S. 25..... 10
Gentini Case, Venezuelan Arbitration of 1903, p. 720.. 29
Georgia v. Chattanooga, 264 U. S. 472 (1924)..... 19, 20
Gibson v. Chouteau, 13 Wall. 92 (1871).....15, 19
Gouvernement espagnol v. Veuve et heritiers d'Aguado (Paris Court of Appeal 1867), Dalloz 1867, II. 49..20, 23
Government of Bolivia v. Banco Guarantizador de Valores, Gaceta de los Tribunales 1896 (Chile), Vol. I, p. 335..... 25
Hotel du Souverain, Requêtes (1777)..... 20
Humphrey v. The Queen, 2 Can. Exch. 386 (1891)....15, 20
Indiana v. Kentucky, 136 U. S. 479 (1890)..... 29
Inscription of Real Estate of the Government of Bolivia, Gaceta de los Tribunales 1912 (Chile), Vol. II, p. 813 25
King v. Morrall, 6 Price 24, 146 Eng. Rep. 730 (1818).. 14
King of Spain v. Hullett (1833), 7 Bligh N. S. 359.... 20
Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 396, certiorari denied 275 U. S. 571, writ of prohibition denied 265 U. S. 573..... 5, 6
LeRoy v. Crowninshield, 15 Fed. Cas. No. 8269..... 21
Lindsey v. Miller, 6 Pet. 666 (1832)..... 15
Lightfoot v. Davis, 198 N. Y. 261 (1910)..... 21
Louisiana v. Mississippi, 202 U. S. 1 (1906)..... 29
Magdalen College Case, 11 Coke Rep. 66 (1616)..... 15
Maryland v. West Virginia, 217 U. S. 142 (1910)..... 29
Michigan v. Wisconsin, 270 U. S. 295, 308 (1925).... 29
Minturn v. U. S., 106 U. S. 437 (1882)..... 15
Mossman Case, Mexican-American Claims Commission of 1868, Moore Int. Arb. p. 4180..... 29

PAGE

Nation v. Zapata, 28 Gaceta Judicial 96 (Colombia 1920) 24
Otho King of Greece v. Wright (1837), 6 Dowl. 12... 20
People v. Brown, 67 Ill. 435 (1873)..... 20
People v. Gilbert, 18 Johns. 227 (New York 1820).... 15
People v. Hawkins, 157 N. Y. 1 (1898)..... 27
Pesaro, The, 271 U. S. 562 (1926)..... 25
Pious Fund of the Californias, For. Rel. 1902, App. II.. 30
Prioleau v. U. S. (1866), L. R. 2 Eq. 659..... 20
Province of Buenos Aires v. Mar del Plata Club, 20 Jurisprudencia Argentina 575 (Argentina 1926).... 24
Queen, The, v. Black, 6 Can. Exch. 236 (1899).....15, 20
Queen of Holland v. Drucker, [1928] Ch. 877..... 20
Republic of Costa Rica v. Erlanger (1875), L. R. 1 Ch. D. 171..... 20
Republic of Honduras v. Soto (1889), 112 N. Y. 310.. 20
Rhode Island v. Massachusetts, 4 How. 591 (1846).... 29
Rothschild v. Queen of Portugal (1839), 3 Y. & C. 594. 20
Royal Italian Government v. International Committee of Y. M. C. A., 273 N. Y. 468 (1936).....10, 17
Sarropoulos v. Bulgaria, 7 Recueil T. A. M. (1927) 47 .....29, 30
Scotland, The, 105 U. S. 24 (1881)..... 21
Spader Case, Venezuelan Arbitration of 1903, p. 161.. 29
State ex. rel. Lott v. Brewer, 64 Ala. 287..... 15
State of Indiana v. State of Kentucky, 136 U. S. 479 (1889) 19
State of Russia v. National City Bank, 69 F. (2d) 44, 83 F. (2d) 236, certiorari denied 299 U. S. 563..... 5
Steele v. U. S., 113 U. S. 128 (1885)..... 15
Stoughton v. Baker, 4 Mass. 521 (1808)..... 15
Tillman v. Guaranty Trust Company (1930), 253 N. Y. 95 4
Treasury Chamber of Kostroma v. Lomachevsky, Senate Civ. Cass. (1879) No. 60..... 23

PAGE

Treasury v. Urriaga, Gaceta de los Tribunales 1883, p. 1129 (Chile) 24
U. S. v. Bank of New York & Trust Co., certiorari granted 296 U. S. 558 ..... 8, 9
U. S. v. Beebe, 127 U. S. 338 (1888) 15, 19
U. S. v. Belmont, 301 U. S. 324 (1937) 6, 8, 9, 26, 27
U. S. v. Brown, 247 N. Y. 211 (1928) 10, 15, 17
U. S. v. Buford, 3 Pet. 12 (1830) 14
U. S. v. Dallas Military Road Co., 140 U. S. 599 (1891) 15
U. S. v. Hoar, 2 Mason 311, Fed. Cas. No. 15373 (1821) 15, 16, 18
U. S. v. Harpootlian, 24 F. (2d) 646 (C. C. A. 2 1928) 30
U. S. v. Insley, 130 U. S. 263 (1889) 15
U. S. v. Kirkpatrick, 9 Wheat. 720 (1824) 15
U. S. v. Knight, 146 Pet. 301 (1840).....16, 30
U. S. v. Michigan, 190 U. S. 379 (1903) 15
U. S. v. Minnesota, 270 U. S. 181 (1926)..... 15
U. S. v. National City Bank of New York, 83 F. (2d) 236 (C.C.A. 2, 1936), certiorari denied 299 U. S. 563 20
U. S. v. Nashville, etc., R. Co., 118 U. S. 120 (1886).. 8, 14, 16, 18, 19
U. S. v. Nicholl, 12 Wheat. 505 (1827) 15
U. S. v. Oregon Lumber Company, 260 U. S. 290 (1922) 28
U. S. v. Thompson, 98 U. S. 486 (1878) 15, 16, 18, 19
U. S. v. Vanzandt, 11 Wheat. 184 (1826)..... 15
U. S. v. Wagner (1867), L. R. 2 Ch. App. 582 20
U. S. v. Whited & Wheless, 246 U. S. 552 (1918).... 15
U. S. v. Williams, 5 McLean 133, Fed. Cas. 16721 (1850) 15
Utah Power & Light Co. v. U. S., 243 U. S. 389 (1917) 15
Western Lunatic Asylum v. Miller (1887), 29 W. Va. 326 1 S. E. 740 17
Williams Case, American-Venezuelan Claims Commission of 1885, Moore Int. Arb. p. 4181..... 3
Wood v. Carpenter (1879), 101 U. S. 135, 139 ..... 28, 29

Statutes Cited.

	PAGE
Argentina, Civil Code Arts. 33, 34, 3951	24
Belgium, Civil Code, Art. 2227; Law of May 15, 1846	23
Brazil, Civil Code Arts. 13, 14, 163	24
Chile, Civil Code Art. 2497	24
Colombia, Law 153 of 1887 Art. 80, Civil Code Art. 2517	24
Costa Rica, Civil Code Arts. 6, 15, 27	24
Cuba, Civil Code Arts. 35, 1932	24
Dominican Republic, Civil Code Art. 2227	24
Ecuador, Civil Code Art. 2479	24
Guatemala, Civil Code Arts. 15, 1050	24
Haiti, Civil Code Art. 1995	24
Holland, Civil Code Art. 1991	23
Honduras, Civil Code Arts. 56, 2265	24
Italy, Civil Code Art. 2114	23
Mexico, Civil Code for Federal District and Territories Arts. 25, 1137, 1148	24
New York Civil Practice Act:	
§ 15	12
§ 48	12
§ 54	15
Rule 107	12
Nicaragua, Civil Code Art. 878	24
Panama, Civil Code Arts. 64, 1670	24
Paraguay, Civil Code Arts. 33, 34, 3951	24
Peru, Law of October 4, 1901, Art. 1, Law No. 2247, December 5, 1902	24
Portugal, Civil Code Art. 516	23
Russia, Civil Laws Vol. X, Part 1, Art. 694 Note Annex Art. 1	23
Civil Code Art. 44 as amended by Decree of December 10, 1934, Coll. of Law USSR (1934) No. 43, Art. 258	23
Salvador, Civil Code Art. 2407	24

Spain, Civil Code Art. 1932 25
United States, Conformity Act, 28 United States Code § 724, Rev. Stat. § 914 12
Judicial Code § 240(a), 28 United States Code § 347(a) as amended 11
Rules of Decision Act, 28 United States Code § 725, Rev. Stat. § 721 .....11, 27
Uruguay, Civil Code Arts. 21, 1194..... 24
Venezuela, Civil Code Arts. 17, 2032..... 24

Authorities Cited.

Ernest Angell, "Sovereign Immunity," 35 Yale Law Journal 150 28
Anuario de la Legislacion Peruana (1928)..... 24
Blackstone's Commentaries (Chase 3rd ed. 1903).... 22
Comyn's Digest 15
Lasala-Llanas, Sistema de Derecho Civil International e Interregional (Madrid 1933) 25
Pan-American Code of Private International Law Arts. 31, 229, 231 23
Rules of Prescription adopted by Institute of International Law, Annuaire (1925) p. 558; 19 Am. Journ. Int. Law 760 29
Selden, Table Talk (F. Pollock Ed.) 22
Treaty Information Cumulative Index (Washington 1937) 24
Westlake Private International Law (7th ed. 1925).... 22
Wharton International Law Digest (2nd ed.)..... 29
Yale Law Journal
Vol. 35, p. 150 28
Vol. 47, p. 132 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

GUARANTY TRUST COMPANY OF NEW YORK, Petitioner, against UNITED STATES OF AMERICA.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Guaranty Trust Company of New York, a New York corporation and the defendant in the above-entitled action, petitions for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit rendered therein August 23, 1937 (one judge dissenting), which reversed a judgment entered by the United States District Court for the Southern District of New York on November 5, 1936, dismissing the complaint.

The Action.

The action is at law, and was instituted by the United States in the District Court for the Southern District of New York on September 21, 1934, to recover a bank account. The account had in 1917 stood with the defendant to the credit of the Ministry of Finance of the Government of the

State of Russia. The United States asserts title to it by virtue of the assignment of the Soviet Government to the United States effected by the exchange of letters between President Roosevelt and the Soviet Commissar for Foreign Affairs on November 16, 1933 (R., 5).

Pursuant to the New York practice the defendant moved upon affidavits and upon the depositions of the Russian Ambassador and his Financial Attaché to dismiss the complaint upon the single ground of the statute of limitations. This motion was granted by the District Court, and judgment entered in favor of the defendant on November 5, 1936. The United States appealed, and the decision of the Circuit Court of Appeals reversing that judgment is that which the petitioner seeks to review in this Court.

Questions Presented.

1. Whether in an action at law in a United States court in New York a foreign sovereign plaintiff is subject to the defense of limitations established by the statute law of New York.

2. Whether the indebtedness of a New York bank to a foreign state, in the form of a deposit account, is entitled to any peculiar privilege or exemption of sovereignty in a municipal court of the United States whose jurisdiction is invoked by the depositor.

3. Whether the assignment of Russian funds in the United States executed by the Soviet Government to the United States on November 16, 1933 overrides the statute of limitations of the State of New York.

Summary Statement of Matter Involved.

The petitioner Guaranty Trust Company of New York is a corporation engaged in the business of banking in the City and State of New York. In July, 1916 there was opened with

it by the Imperial Russian Government a deposit account in the name of Section Etrangère Ministère des Finances (R., 281-2), meaning the Foreign Section of the Ministry of Finance of that Government. This account was in every respect an ordinary commercial deposit. While originating as the proceeds of a loan by a group of New York banks to the Imperial Russian Government (R., 368-369), it was overdrawn on July 2, 1917 (R., 126), and the entire balance thereafter created and now claimed in this action by the United States as assignee of the State of Russia is the proceeds of a payment or deposit by the Russian Financial Attaché to petitioner on July 12, 1917 (R., 126, 179, 282). The conditions as to interest governing the account were those of the ordinary commercial account (R., 402). Drawings thereon were made by letter or cable from the Foreign Section (R., 372).

The Soviet Government seized control from the previously recognized Russian Government on November 7, 1917. On December 12, 1917, the balance in the account Section Etrangère Ministère des Finances was $4,976,722.78 (R., 5). This with interest is the amount now claimed by the United States as assignee of the State of Russia.

The petitioner had various accounts with Russian banks at the time of the Soviet Revolution. From its representative in Russia it ascertained in February, 1918 that the Soviet Government had terminated the existence of the Russian commercial banks by nationalization, that it had repudiated the public debt, and that the petitioner's accounts with the Russian banks would not be paid (R., 127). Those banks also had accounts in dollars with the petitioner in New York. On February 25, 1918, the petitioner consolidated the accounts with it of the former Russian banks and consolidated its accounts abroad with those banks, entering both debit and credit balances of all the accounts in a single new account entitled "Russian Government Account", and placed to the credit of that account the balance formerly in the Section Etrangère Ministère des Finances account (R., 128-

129). As part of that transaction the account in suit was definitely closed on the books of the petitioner on February 25, 1918 (R., 129).

The purpose of the entries was to avail of the account in suit to pay the petitioner's claim against the Russian Government for its accounts in Russia. The total amount owed by the Russian Government to the petitioner, according to the books of the latter, was $9,000,000 at the time of the consolidation, while the total owed by the petitioner to the Russian Government, including the account in suit, was $7,226,000 (R., 129). On March 14, 1918, the closing of the account in suit and the creation of the consolidated account were approved by the Executive Committee of the Board of Directors of the petitioner (R., 129-130).

The Soviet decree of nationalization, the making by the petitioner of the entries described, and the formal approval thereof by the Directors were found as facts by the District Court, and were indeed undisputed (R., 419-420). The Circuit Court of Appeals did not disturb these findings.

The New York statute of limitations as construed by the highest court of New York causes limitations to run upon an unequivocal repudiation or denial of liability by a bank as well as upon a demand and refusal; and this point was conceded below (R., 456; 91 F. [2d] 898, 899). *Tillman* v. *Guaranty Trust Company* (1930) 253 N. Y. 95.

After November, 1917 and before June 30, 1922, the Ambassador and the Financial Attaché of the then recognized Russian Government made various attempts to obtain possession of the account in suit for the purpose and the use of their Government. By them, or on their behalf, inquiries and demands were made, and to them notice was communicated by the petitioner, directly and indirectly, of the consolidation of accounts above described, whereby the account in suit was applied to payment of the petitioner's claim against the State of Russia. The petitioner denied any liability with respect to the account to the Ambassador as representing his Government. The District Court found two

separate occasions on which the petitioner communicated to the Ambassador its repudiation of liability (R., 423-424), and four separate occasions when it communicated such repudiation to the Financial Attaché who was also at the respective times Chargé d'Affairs (R., 424-428). The Circuit Court of Appeals did not disturb these findings.

The Russian Ambassador and Financial Attaché here mentioned represented the then recognized Government of Russia. They transacted business as such with the United States Government and with American citizens. Their authority to institute and maintain suits on behalf of the State of Russia has heretofore been fully determined. *Lehigh Valley R. Co.* v. *State of Russia,* 21 F. (2d) 396, 400, certiorari denied 275 U. S. 571, writ of prohibition denied 265 U. S. 573. See opinion below at R., 457, 91 F. (2d) at 899.

The Soviet assignment to the United States in express terms left undisturbed non-judicial acts done in good faith by American nationals with the Ambassador and Financial Attaché here involved. *State of Russia* v. *National City Bank,* 69 F. (2d) 44, 48, certiorari denied 299 U. S. 563 with respect to judgment reported in 83 F. (2d) 236.

The applicable New York statute of limitations is six years from the accrual of the cause of action. On the facts found the District Court concluded that the cause of action in favor of the State of Russia accrued at the latest in 1922, that the petitioner's repudiation and denial communicated to the Ambassador were communicated to the State of Russia by virtue of his authority to sue, that the State of Russia was barred with respect to this action by 1928, that recognition by the United States on November 16, 1933 of the Soviet Government which took power on November 7, 1917 did not destroy the defense as perfected against the State of Russia through the preceding government, and that the United States upon taking an assignment of the claim took it subject to the defense (R., 416-441). He, therefore, dismissed the complaint.

The Circuit Court of Appeals reversed this judgment with opinions by Judge Swan and Judge Manton, Judge Chase dissenting without opinion (R., 455-465). These two opinions placed the reversal upon an extremely narrow ground,[1] left undisturbed the conclusions of the District Court on all other matters of law, and left undisturbed all its findings of fact. The majority thought that a foreign sovereign could not be bound by a municipal statute of limitations. They said that no direct authority upon the subject existed. They dismissed as dicta language used by this Court in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437, and by other courts to the effect that a foreign sovereign is subject to limitations, and concluded that dicta of this Court in other cases require a contrary result. They held that exemption from the statute of limitations of the forum is a necessary part of the immunity due to a sovereign state, and that in this respect a foreign sovereign is entitled to the same treatment as the local sovereign. They held that these conclusions were authorized by the language used by this Court in *United States* v. *Belmont*, 301 U. S. 324, and that due effect could not be given to the assignment of the Soviet Government to the United States without overriding the state statutes of limitations.

---

[1] The Court pointedly refrained from basing its decision upon what was perhaps the principal ground urged by the United States in behalf of its appeal, namely that the recognition of the Soviet government had by retroactivity wiped out acts and the legal effect of acts done in this country by the accredited representatives of the government theretofore recognized on behalf of the State of Russia. The reason the Court did not accept this contention is no doubt that the terms of the Soviet assignment preclude it (p. 5 above), and that the Court had itself previously determined that the doctrine of retroactivity would be confined, in the case of Russia, to acts performed by the Soviet Government "in its own territory." *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) 396, 401, certiorari denied 275 U. S. 571, writ of prohibition denied 265 U. S. 578. Judgments aggregating $984,104.62 were paid in 1927 in consequence of that decision (R., 395-6, 398). In every case in which the doctrine of retroactivity has been applied by this Court or by any other court the subject-matter to which it was applied was at the time within the territory of the foreign sovereign in question.

Reasons why a Writ of Certiorari Should Issue.

1. The Circuit Court of Appeals has decided an important question of general law in a way both untenable and conflicting with the weight of authority.

The exemption accorded by this decision to foreign sovereigns with respect to their business dealings in this country has never before been accorded to a foreign sovereign state by the municipal tribunals of any country in the world, is contrary to the rule of decision indicated by this Court in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, is not required by the theory upon which an exemption from limitations has regularly been accorded to the *local* sovereign by the English and the American courts, and is contrary to judicial practice throughout the world. The decision below thus confers a privilege upon foreign sovereigns as claimants in the courts of the United States and of every state in the Union which would not in the reverse situation be accorded to the United States as suitor in the courts of any other nation.

The conclusion reached by the Circuit Court of Appeals is not required by the concept of sovereign immunity as heretofore understood, for there is an established limitation upon that concept in that the foreign sovereign plaintiff must with respect to the subject-matter upon which he invokes the jurisdiction of any municipal court, accept the status in that court of an ordinary private litigant. The only cases in this country which have considered the question, indicate that the foreign sovereign plaintiff is bound by the statute of limitations.

By virtue of the rule which the Circuit Court of Appeals has adopted in this case, all the transactions of American banks, business houses, citizens and corporations with foreign sovereigns, from the present time back to 1787, are exposed to question and opened to litigation in disregard of the principle of repose which both the decisions of this Court and international practice have recognized to be of the essence of sound policy. This Court has in the course of litigation

between the States of the Union consistently applied as wise and necessary the principle of the extinction of rights by the lapse of time. It has been consistently recognized by this Court that the barring of stale claims is in the interest of justice. Recognition of the same principle is general in international tribunals, even in the absence of an applicable statutory period of limitation or prescription.

It is especially unfortunate that a new development in the doctrine of sovereign immunity should be put forward in the form of the rule now announced by the Circuit Court of Appeals at the moment when the governments of so many states have taken over so great a proportion of the conduct of the business and affairs which formerly belonged to private individuals.

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, and has decided it in a way contrary to the principle of decision heretofore indicated by this Court for that question.

In reaching its conclusion the Circuit Court of Appeals has misconceived and misapplied certain language of this Court used collaterally and on a quite different issue in *United States* v. *Belmont*, 301 U. S. 324. The Circuit Court of Appeals also misinterpreted an expression used by this Court in *United States* v. *Nashville, etc. R. Co.*, 118 U. S. 120, 125, to the effect that the rule *nullum tempus occurrit regi* is "applicable to all governments alike." This expression relates merely to the origin of the *nullum tempus* rule in English law, denotes that it was not part of the royal prerogative and so passed to the United States as a rule applicable to the local sovereign, and has nothing to do with the question whether foreign sovereigns are entitled to the same privilege.

With respect to the Soviet assignment of November 16, 1933, this Court has twice at the instance of the United States granted certiorari to review decisions below. *U. S.* v. *Belmont*, certiorari granted 300 U. S. 641; *U. S.* v. *Bank of*

New York & Trust Co., certiorari granted 296 U. S. 558. In its petition for certiorari in the *Belmont* case the United States said[1] that there were pending in the state courts or local federal courts about fifteen suits, involving approximately $8,000,000, in which the United States Government seeks to enforce the assignment in question. For the guidance of the lower courts in that important body of litigation, it is essential that the rule announced by the Circuit Court of Appeals, if there is a reasonable probability of its being erroneous, be immediately reviewed by this Court.

It is respectfully submitted, upon the brief following, that the result reached below is almost certainly erroneous.

3. The decision of the Circuit Court of Appeals is conclusive of the question of limitations presented by this petition, and that question would be decisive of the case if decided by this Court in accordance with the weight of authority as shown by the following brief.

The question of limitations is fully presented by this record and is entirely separate from the only other question which would remain to be tried between the parties if the defense of limitations were decided adversely to the petitioner, viz., the petitioner's set-off against the State of Russia. But it is fitting and necessary that the petitioner's rights in respect of the defense of limitations be finally determined before it be put to trial on the question of set-off, because the very purpose of limitations is to avoid the litigation of stale claims, after the destruction of documentary evidence and the death of witnesses. It is now twenty years since the revolution in Russia which resulted in the seizure and nationalization of the Russian banks. There followed a long period of internal disturbance and civil war. In the interval witnesses have died or disappeared, and records been lost or destroyed. It is surely reasonable for the petitioner to ask that its rights under the statute of the forum be finally determined before it be sent to trial on those very matters

[1] November 1936; p. 9.

which are intended to be protected by the doctrine of limitations from belated inquiry.

The power of this Court to review by certiorari even interlocutory orders is unquestioned. *Gay* v. *Ruff* (1934), 292 U. S. 25, 30-1. The present is an unusual case involving questions of general and international importance.

4. The Circuit Court of Appeals has decided an important question of local law in a way deemed to be in conflict with applicable local decisions.

This Court under the Rules of Decision Act applies the New York statute of limitations as it is construed by the highest court of New York. The highest court of New York has, in *United States* v. *Brown*, 247 N. Y. 211, 218, and in *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468, clearly intimated, if not decided, that the local statute of limitations binds foreign sovereign states.

Prayer.

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as is proper.

New York, N. Y., November 8, 1937.

GUARANTY TRUST COMPANY OF NEW YORK,
By JOHN W. DAVIS,
Its Attorney.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R., 416-441) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R., 455-465) is reported in 91 F. (2d) 898.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered August 23, 1937 (R., 466). The jurisdiction of this Court is invoked under the provisions of section 240 (a) of the Judicial Code, 28 United States Code, § 347a, as amended by the Act of February 13, 1925.

Statement of the Case.

A summary statement of the facts is given in the petition, pages 2-6 above.

Statutes Involved.

The Rules of Decision Act, 28 United States Code § 725, Rev. Stat. § 721, provides:

> *"Laws of States as rules of decision.* The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Conformity Act, 28 United States Code § 724, Rev. Stat. § 914, provides:

> *"Conformity to practice in State courts.* The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

The Civil Practice Act of the State of New York § 48 provides, so far as material:

> "The following actions must be commenced within six years after the cause of action has accrued:
>
> 1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument."

The Civil Practice Act § 15 provides, so far as material:

> "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete except in one of the following cases:
>
> * * * * *
>
> 2. Where there was a deposit of money not to be repaid at a fixed time but only upon a special demand, or a delivery of personal property not to be returned specifically or in kind at a fixed time or upon a fixed contingency, the time must be computed from the demand."

Rule 107 of the Rules of Civil Practice of the State of New York provides, so far as material:

> "Within twenty days after the service of the complaint, the defendant may serve notice of motion for

judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint and affidavit stating facts tending to show:

* * * * *

6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon."

Specification of Errors to be Urged.

1. The Circuit Court of Appeals erred in holding that the statute of limitations of the forum does not bar a foreign sovereign suitor therein.

2. The Circuit Court of Appeals erred in holding that the giving of due effect to the Soviet assignment to the United States required it to disregard the statute of limitations of the forum.

3. The Circuit Court of Appeals erred in disregarding the high public policy which attaches in both municipal and international law to the principle of repose embodied in prescription and limitations.

POINT I.

The Circuit Court of Appeals erred in holding that the statute of limitations of the forum does not bar a foreign sovereign suitor therein.

It has never heretofore been decided in any court that the rule of limitations constituting part of its procedure could not be invoked and availed of by a defendant against whom a foreign sovereign pursued his remedy in that court.

A. CONCEDEDLY THE UNITED STATES AS ASSIGNEE OF THE FOREIGN SOVEREIGN'S CLAIM IS BARRED IF ITS ASSIGNOR WAS BARRED AT THE TIME OF THE ASSIGNMENT.

The petitioner's proof in the District Court showed the accrual of a cause of action for the account in suit on behalf of the State of Russia prior to June 30, 1922 (R., 424, 431; R., 456, 91 F[2d] at 899). The statute of limitations had thus run against the State of Russia, if at all, by June 30, 1928, whereas the claim was not acquired by the United States until November 16, 1933 (R., 5). It is established on authority not heretofore disputed that the claim, if barred in the hands of the State of Russia, was barred in the hands of the United States as its assignee.[1] The District Judge regarded this point as conceded by the United States (R., 417). He also regarded it as clearly true (R., 417) and the Circuit Court of Appeals did not question it (R., 456, 460; 91 F[2d] at 899, 900). The principle likewise undisputed, that the statute of limitations does not run against the United States itself[2] is therefore out of the case.

The only question in the case is whether as matter of law limitations ran against the State of Russia and had become perfected by or before November 16, 1933.

B. THE CIRCUIT COURT OF APPEALS ERRED IN APPLYING TO A FOREIGN SOVEREIGN THE PRINCIPLE UPON WHICH THE LOCAL SOVEREIGN HAS HERETOFORE BEEN HELD EXEMPT FROM LIMITATIONS AND WHICH IN ITS NATURE IS APPLICABLE TO THE LOCAL SOVEREIGN ONLY.

1. In every case in which, so far as we can find, a sovereign state has been held exempt from the running of limita-

---

[1] *U. S.* v. *Buford*, 3 Pet., 12, 29 (1830); *U. S.* v. *Nashville &c. R. Co.*, 118 U. S. 120, 125 (1886); *King* v. *Morrall*, 6 Price 24, 146 Eng. Rep. 730 (1818).

[2] *Davis* v. *Corona Coal Co.*, 265 U. S. 219 (1924).

tions or of laches against it, the sovereign involved was the sovereign of the forum.[1] And even as to the local sovereign the rule of exemption is not necessarily absolute. This Court has intimated the possible existence of exceptions thereto.[2] State courts have occasionally insisted upon applying even to the state the local statute of limitations.[3] The New York statute of limitations, Civil Practice Act § 54, is expressed to govern actions by the State.

2. The principle upon which exemption from limitations has been accorded to the local sovereign in all the decided cases is one by its nature restricted to the sovereign of the forum and not applicable to a foreign sovereign who may resort to the courts of this country. For that principle is one

---

[1] United States. *U. S.* v. *Kirkpatrick*, 9 Wheat. 720, 735 (1824); *U. S.* v. *Vanzandt*, 11 Wheat. 184, 190 (1826); *U. S.* v. *Nicholl*, 12 Wheat. 505, 509 (1827); *Dox* v. *Postmaster General*, 1 Pet. 318, 325 (1828); *Lindsey* v. *Miller*, 6 Pet. 666, 672 (1832); *Gibson* v. *Chouteau*, 13 Wall. 92, 99 (1871); *Armstrong* v. *Morrill*, 14 Wall. 120, 145 (1871); *Gaussen* v. *U. S.*, 97 U. S. 584, 590 (1878); *U. S.* v. *Thompson*, 98 U. S. 486, 488 (1878); *Minturn* v. *U. S.*, 106 U. S. 437, 444 (1882); *Steele* v. *U. S.*, 113 U. S. 128, 134 (1885); *U. S.* v. *Beebe*, 127 U. S. 338, 344 (1888); *U. S.* v. *Insley*, 130 U. S. 263, 266 (1889); *U. S.* v. *Dallas Military Road Co.*, 140 U. S. 599, 632 (1891); *U. S.* v. *Michigan*, 190 U. S. 379, 405 (1903); *Utah Power & Light Co.* v. *U. S.*, 243 U. S. 389, 409 (1917); *U. S.* v. *Whited & Wheless*, 246 U. S. 552, 561 (1918); *Chesapeake & Delaware Canal Co.* v. *U. S.*, 250 U. S. 123, 125 (1919); *DuPont deNemours & Co.* v. *Davis*, 264 U. S. 456, 462 (1924); *Davis* v. *Corona Coal Co.*, 265 U. S. 219 (1924); *U. S.* v. *Minnesota*, 270 U. S. 181 (1926); *U. S.* v. *Hoar*, 2 Mason 311, Fed. Cas. No. 15373 (1821); *U. S.* v. *Williams*, 5 McLean 133, Fed. Cas. 16721 (1850); *State ex rel Lott* v. *Brewer*, 64 Ala. 287, 296, 299 (1879); *Stoughton* v. *Baker*, 4 Mass. 521 (1808); *People* v. *Gilbert*, 18 Johnson 227 (New York 1820); *U. S.* v. *Brown*, 247 N. Y. 211 (1928).

England. *Magdalen College Case*, 11 Coke Rep. 66, 75a (1616); *Comyn Dig., Title Prerog.* D. 86. (*Cire.* 1695); *Cayzer Irvine & Co.* v. *Board of Trade*, [1927] 1 K. B. 269, 294 (dictum), [1927] A. C. 610.

Canada. *Humphrey* v. *The Queen*, 2 Can. Exch. 386, 390 (1891); *The Queen* v. *Black*, 6 Can. Exch. 236, 253 (1899).

[2] *Utah Power & Light Co.* v. *U. S.*, 243 U. S. 389, 409 (1917); *U. S.* v. *Michigan*, 190 U. S. 379, 405 (1903); *Bowers* v. *New York etc. Lighterage Co.*, 273 U. S. 346, 350 (1927).

[3] *Gathright* v. *State*, 129 Ark. 339, 195 SW 1069, 1070 (1917); cf. *In re Ash's Estate*, 202 Pa. St. 422, 51 Atl. 1030 (1902).

of *local* public policy. The formulation thereof made by Mr. Justice Story in 1821[1] was:

> "The true reason indeed why the law has determined that there can be no negligence or laches imputed to the crown and therefore no delay should bar its right . . . is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss by the negligence of public officers."

This statement has been repeatedly adopted by this Court as the ground for the exemption in favor of the local sovereign.[2]

When the question arises whether the exemption should now be extended to the case of a foreign sovereign plaintiff in a United States court, it at once appears that the object of the rule cannot be attained in such a case and that the ground thereof does not extend to it. No public policy of the United States, nor any interest of its citizens, is served or advanced by protecting a foreign sovereign from the consequences of the negligence of its officers. *Cessante ratione cessat lex ipsa.* This Court has pointed out as much in a dictum in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437 (1903). That was an action by the French Republic as lessor and by its lessee for the unlawful use of a commercial name or trademark. The defense of laches was pleaded. This Court held that the interest of the French Republic in the litigation was so remote that it could not in any event avail of the rule *nullum tempus occurrit regi.* This Court also said:

> "It is at least open to doubt whether the maxim *nullum tempus,* applicable to our own government, can be invoked in behalf of a foreign government suing in

---

[1] *U. S.* v. *Hoar,* Fed. Cas. No. 15373 (1821).

[2] *Fink* v. *O'Neil,* 106 U. S. 272, 281 (1882); *U. S.* v. *Nashville etc. R. Co.,* 118 U. S. 120, 125 (1886); *U. S.* v. *Thompson,* 98 U. S. 486, 489 (1878); *U. S.* v. *Knight,* 14 Pet. 301, 315 (1840).

> our courts. The doctrine is one of public policy, and is based upon the assumption that the officers of the government may be so busily engaged in the ordinary affairs of state as to neglect a vindication of its interests in the courts. Whether this exemption can be set up by a foreign government in the prosecution of suits against our own citizens—in other words, whether the latter are not entitled to the benefit of the ordinary defences at law, is a question which does not necessarily arise in this case, and as to which we are not called upon to express an opinion."

It was exactly for the reason that the rationale of the rule heretofore applied with respect to the local sovereign, does not extend to a foreign sovereign that the District Court, quoting part of the above language, decided in favor of the petitioner (R., 437-438). The Circuit Court of Appeals disregarded the rationale of the rule as expressed by this Court. In so doing it also disregarded the only decided cases in this country which have at all considered the question and which have unanimously reached the conclusion that a foreign sovereign plaintiff is bound by the statute of limitations of the forum. These cases are:

Commissioners of the Sinking Fund of Louisville v. *Buckner* (C. C. Ky. 1891), 48 F. 533, 536 (dictum);

Western Lunatic Asylum v. *Miller* (1887), 29 W. Va. 326, 1 S. E. 740;

U. S. v. *Brown* (1928), 247 N. Y. 211, 218 (dictum);

Royal Italian Government v. *International Committee of Y. M. C. A.*, 273 N. Y. 468 (1936).

3. In turning from this clearly indicated principle of decision, the Circuit Court of Appeals seems to have been influenced[1] by a misinterpretation of the dictum of this Court

[1] See R., 457, 91 F. (2d) 898, 899.

in *U. S.* v. *Nashville etc. R. Co.* (1886), 118 U. S. 120, 125 repeated from *U. S.* v. *Thompson* (1878), 98 U. S. 486, 489, 490. This dictum was that the principle of public policy above described is

> "applicable to all governments alike."

From these words it seems to have been inferred that it was the intention of this Court to say that the exemption from limitations accorded to the government of the forum is applicable and should be applied to foreign government plaintiffs. But that was clearly not the meaning of the words quoted. They are taken by this Court from the opinion of Mr. Justice Story in the leading case of *U. S.* v. *Hoar,* Fed. Cases No. 15,373 (1821). In that case, after using the language above quoted (p. 16), Mr. Justice Story continued:

> "And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception introduced for the public benefit and equally applicable to all governments."

Examination of his opinion shows that he was engaged in determining whether the English rule that no statute of limitations runs against the Crown, in the absence of an express provision to that effect, was taken over by the American states upon their separation from England. That question would depend upon whether the rule was a part of the royal prerogative or whether it was a general rule of English public policy. Mr. Justice Story determined that it was a general rule of English public policy, and of a nature which would apply to each government in its own territory, and so determined that the rule had been received by the State of Massachusetts as part of the English common law. He did not decide and did not say that the rule *nullum tempus occurrit regi* could be availed of by a foreign sovereign. That question was not before him.

The words "applicable to all governments," which appear several times in the opinions of this Court, are taken uniformly from this opinion of Mr. Justice Story and necessarily without any implication that they touch the question now presented. In fact the implication has been to the contrary. Mr. Justice Field, who employed the expression in *Gibson* v. *Chouteau*, 13 Wall. 92, 99 (1871), wrote the opinion in *State of Indiana* v. *State of Kentucky*, 136 U. S. 479, 510 (1889), which applies the principle of prescription in boundary questions between states of the Union, and cited therefor Vattel's statement that prescription founded on the lapse of time must be admitted between nations as a valid and incontestable title.[1]

In *U. S.* v. *Nashville etc. R. Co.*, in *U. S.* v. *Thompson*, and in *Gibson* v. *Chouteau*, the holding was that the local sovereign was exempt from the application of limitations, and the phrase "applicable to all governments alike" had no possible reference to a foreign sovereign.

4. A further ground of the decision below was that failure to accord to a foreign sovereign the exemption from limitations enjoyed by the local sovereign is to grant the former "less than full sovereign rights."[2] But this is not an argument at all. It is a commonplace that foreign sovereigns do not have full sovereign rights within the territory of the local sovereign. They cannot within the territory of the local sovereign levy taxes, raise an army, exercise the right of eminent domain. If they could, the local sovereign would have ceased to be master in his own house. It was for this reason that this Court in *Georgia* v. *Chattanooga*, 264 U. S. 472 (1924), held that property of the State of Georgia within the State of Tennessee was held by Georgia in a private, not a sovereign capacity. At page 481:

---

[1] In *U. S.* v. *Beebe* (1888), 127 U. S. 338, 347, this Court said that the right of exemption from the statute of limitations is an

"exemption of the Government designed for the protection of the rights of the United States alone."

[2] See R., 458, 91 F. (2d) 898, 900.

> "The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity."[1]

It is settled that a foreign sovereign who comes into a municipal court must play the role of a litigant like any other suitor, and that its suit is determined according to the rules applicable to private suitors in like cases. *U. S.* v. *National City Bank of New York*, 83 F. (2d) 236, 238, 239 (C. C. A. 2 1936), certiorari denied 299 U. S. 563. Within this rule a foreign sovereign plaintiff would unquestionably be held to be subject to the equitable doctrine of estoppel in respect of the subject-matter of the action. Yet the local sovereign is not subject to estoppel.[2] A foreign sovereign plaintiff is subject to the direction of the court with respect to discovery.[3] He can be obliged by the forum to post security for costs.[4] If he loses his case, he is ordered to pay costs.[5] Yet the local sovereign of course does not pay costs.

Sovereign immunity with respect to the subject-matter of this suit is precisely what the sovereign surrenders when he

---

[1] So the Advocate-General Seguier said in the case of the *Hotel du Souverain*, Requêtes (1777) "Pourquoi donc un souverain serait-il exempt? Il n'est souverain que dans ses états." See the judgment of the Permanent Court of International Justice in *French Republic* v. *Government of the Serb-Croat-Slovene Kingdom*, July 12, 1929, 2 Hudson World Court Reports 344, 371.

[2] *Candler* v. *Lunsford*, 20 N. C. 407 (1839); *People* v. *Brown*, 67 Ill. 435, 438 (1873); *The Queen* v. *Black*, 6 Can. Exch. 236, 253 (1899); *Humphrey* v. *The Queen*, 2 Can. Exch. 386, 390 (1891).

[3] *King of Spain* v. *Hullett* (1833), 7 Bligh N. S. 359, 393; *Rothschild* v. *Queen of Portugal* (1839), 3 Y. & C. 594; *Prioleau* v. *U. S.* (1866), L. R. 2 Eq. 659; *U. S.* v. *Wagner* (1867), L. R. 2 Ch. App. 582; *Republic of Costa Rica* v. *Erlanger* (1875), L. R. 1 Ch. D. 171.

[4] *Republic of Honduras* v. *Soto* (1889), 112 N. Y. 310; *Emperor of Brazil* v. *Robinson* (1837), 5 Dowl. 522; *Otho King of Greece* v. *Wright* (1837), 6 Dowl. 12; *The Beatrice* (1866), 36 L. J. Adm. 10.

[5] *Gouvernement espagnol* v. *Veuve et heritiers d'Aguado* (Paris Court of Appeal 1867), Dalloz 1867, II. 49; *Queen of Holland* v. *Drucker* [1928] Ch. 877, 884.

invokes the jurisdiction of the municipal court. By so doing he necessarily subjects himself to the defenses arising by the law of such court, including the defense of limitations. If it be said that the defense of limitations results in the foreign sovereign's being deprived of his property right by reason of something which occurred before he sought the aid of the court (R., 458, 91 F[2d] 898, 900), the answer is that the sovereign had at all times entire liberty to sue, and that the barring of his suit by reason of tardiness in his exercise of that liberty does not destroy his property right, but merely terminates the remedy theretofore provided by the forum.[1] Here the remarks of Mr. Justice Story in the course of an opinion discussing the statute of limitations are pertinent:

> "Courts of law are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order, from mere comity to any foreign nation. It is sufficient, if it gives to foreigners the same means to enforce their rights, as it does to its own citizens."[2]

Where the policy of the forum so directed, this Court has not hesitated to apply a statutory rule so as to cut down the property right of a foreign sovereign. *The Scotland,* 105 U. S. 24 (1881). The Peruvian Government libelled a British ship for loss occasioned to a cargo, which that Government owned, by collision with another ship belonging to the owner of the Scotland. This Court, reversing the District Court, applied the rule of limited liability in admiralty and said (p. 31):

---

[1] *Campbell* v. *Holt,* 115 U. S. 620, 626 (1885); *Lightfoot* v. *Davis,* 198 N. Y. 261, 264 (1910).

[2] *LeRoy* v. *Crowninshield,* 15 Fed. Cas. No. 8269, at p. 365, 2 Mason 151 (C. C. Massachusetts 1820).

"We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our courts for redress."

C. THE RULE ADOPTED BY THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE RULE APPLIED IN THE MUNICIPAL COURTS OF ALL OTHER COUNTRIES AND GIVES FOREIGN SOVEREIGNS A PRIVILEGE WHICH THE UNITED STATES ITSELF AS A SOVEREIGN PLAINTIFF WOULD ENJOY IN NO OTHER COUNTRY.

By the law of every foreign country, so far as appears, a foreign sovereign suitor is subject to the local rule of limitation or prescription. The United States if a plaintiff in any other country would find itself barred by the neglect or delay of its agents, and would be defeated by the defense which the Circuit Court of Appeals denies to American citizens in litigation with foreign sovereigns here. Thus the decision below creates a precedent of great significance to the international relations of the United States, to the distinct disadvantage of this country and its citizens as compared with the rest of the world.

In England a foreign sovereign plaintiff is bound with respect to all defenses exactly as a private corporation or person would be,[1] and hence would be barred by limitations. In the time of John Selden, in a case in which the King of Spain was a party, a writ of civil outlawry was issued against him so as to compel the payment of costs by the King upon penalty of his being barred from the privilege of the courts of England.[2] In France and other civil law countries whose law is based upon the Code Napoleon, the civil codes almost uniformly provide that the local sovereign is barred by prescription. The French Civil Code provides:

---

[1] Westlake, Private International Law, 7th ed. 1925, page 272.

[2] Selden, Table Talk (F. Pollock Ed.), page 68; cf. Blackstone's Commentaries (Chase 3rd ed. 1903) page 763.

"Art. 2227. The state, public institutions, and municipalities are subject to the same rules of prescription as are private persons, and may invoke them likewise."

The same rule is deemed to apply to a foreign sovereign as a matter of course. Hence, the French period of limitations being thirty years, the suit of the Spanish Government in the Civil Tribunal of the Seine in 1863 for an accounting of financial transactions of its agent during 1826-31, was held by that Court and, on appeal, by the Paris Court of Appeal to be barred by limitations.[1] In Italy,[2] in Belgium,[3] in Holland,[4] in Portugal,[5] in Imperial Russia[6] and in Soviet Russia[7] likewise the statute of limitations or prescription is expressed to run against the local sovereign, and *a fortiori* would bar a foreign sovereign.

Both the Soviet and the Imperial Russian courts have held the government barred by the statute of limitations.[8] Hence if it were true that an American national who deals with a foreign sovereign must be presumed to do so with the implied understanding that the transaction is to be governed by the law of such sovereign (R., 463, 91 F[2d] at 902), plaintiff's assignor in this case would still be barred.

The Pan-American Code of Private International Law expressly provides that each contracting state, as a juridic

---

[1] *Gouvernement espagnol* v. *Veuve et heritiers d'Aguado*, Dalloz 1867, I, 49.

[2] Civil Code, Art. 2114.

[3] Civil Code, Art. 2227; Law of May 15, 1846.

[4] Civil Code, Art. 1991.

[5] Civil Code, Art. 516.

[6] Civil Laws, Vol. X, Part 1, Art. 694 Note Annex Art. 1.

[7] Civil Code, Art. 44 as amended by Decree of December 10, 1934, Coll. of Law U. S. S. R. (1934) No. 43, Art. 258.

[8] *Administration of Siberian Railroads* v. *Representative of the Supreme Council of People's Economy*, Supreme Court, Civil Cass. Collegium, R. S. F. S. R. No. 31, 470 (1924), Coll. of Decisions Civil Cass. Collegium Supreme Court R. S. F. S. R. (1929) No. 40, page 51. *Treasury Chamber of Kostroma* v. *Lomachevsky*, Senate Civ. Cass. (1879) No. 0; *Birshenker* v. *Administrator of State Properties in the Government of Ekaterinoslav*, Ruling Senate Civ. Cass. (1879) No. 72.

person, shall be subject in the territory of the other contracting states to all the obligations of their law, including the rule of "prescription" or limitations.[1] This Code has been ratified to date by Cuba, Dominican Republic, Haiti, Guatemala, Honduras, Nicaragua, Costa Rica, Salvador, Bolivia, Brazil, Chile, Ecuador, Panama, Peru and Venezuela.[2] In addition the civil codes of practically all the Latin-American states provide that the local sovereign shall be subject to limitations or prescription,[3] and hence necessarily require that a foreign sovereign be similarly bound.

The Codes of Argentina and Paraguay specifically provide that foreign sovereigns are subject to the statute of limitations, as follows:

> "Art. 34. Also foreign states . . . are juridic persons.
> Art. 3951. The national or provincial state and all juridic persons are subject to the same prescriptions as private individuals, with regard to their properties or rights which are susceptible of being private property, and they may likewise invoke prescription."

The cases are numerous in the Latin-American states in which the local sovereign has been barred by limitations.[4]

---

[1] Arts. 31, 229, 231.

[2] Treaty Information Cumulative Index (Washington 1937) page 67; Anuario de la Legislacion Peruana (1928) page 120.

[3] Argentina, Civil Code Arts. 33, 34, 3951; Brazil, Civil Code Arts. 13, 14, 163; Chile, Civil Code Art. 2497; Colombia, Law 153 of 1887, Art. 80, Civil Code Art. 2517; Costa Rica, Civil Code Arts. 6, 15, 27; Cuba, Civil Code Arts. 35, 1932; Dominican Republic, Civil Code Art. 2227; Ecuador, Civil Code Art. 2479; Guatemala, Civil Code Arts. 15, 1050; Haiti, Civil Code Art. 1995; Honduras, Civil Code Arts. 56, 2265; Mexico, Civil Code for Federal District and Territories Arts. 25, 1137, 1148; Nicaragua, Civil Code Art. 878; Panama, Civil Code Arts. 64, 1670; Paraguay, Civil Code Arts. 33, 34, 3951; Peru, Law of October 4, 1901, Art. 1, Law No. 2247 December 5, 1902; Salvador, Civil Code Art. 2407; Uruguay, Civil Code Arts. 21, 1194; Venezuela, Civil Code Arts. 17, 2032.

[4] For example, *Province of Buenos Aires* v. *Mar del Plata Club*, 20 Jurisprudencia Argentina 575 (Argentina 1926); *Nation* v. *Zapata* 28 Gaceta Judicial 96 (Colombia 1920); *Treasury* v. *Urriaga*, Gaceta de los Tribunales 1883, page 1129 (Chile).

While the question of limitations with reference to a foreign sovereign plaintiff appears never to have arisen in those countries, the Supreme Court of Chile in actions by the Bolivian Government has treated the foreign sovereign in every respect as a private litigant subject to counterclaim and in all other respects to the law of the forum.[1]

In Spain the Civil Code, Art. 1932, provides that juridic persons are subject to prescription or limitations; and juridic persons are held to comprise foreign sovereigns.[2]

Against this uniform current of authority in all other countries of the world, the decision of the Circuit Court of Appeals stands as a solitary and unfortunate precedent opening to foreign states in our courts privileges which the United States itself would receive in no other country. Though it be true that a right accorded to a foreign sovereign by our law will not be withdrawn because that sovereign does not in his own country accord the right to us,[3] we submit that the United States courts should not be alert to create new distinctions of the same kind to the disadvantage of their own nationals and indeed to the disadvantage of the United States itself.[4] The rule announced by the Circuit Court of Appeals exposes every American national to litigation by every foreign sovereign with whom at any time in the past and over whatever period he has had business relations. In an era when foreign sovereigns are more and more gathering into their own hands the entirety of the business affairs conducted in their territories, such an innovation is especially undesirable.

---

[1] *Inscription of Real Estate of the Government of Bolivia*, Gaceta de los Tribunales 1912 Vol. II, page 813; *Government of Bolivia* v. *Banco Guarantizador de Valores*, Gaceta de los Tribunales 1896, Vol. I, page 35.

[2] Lasala-Llanas, Sistema de Derecho Civil International e Interregional (Madrid 1933), page 96.

[3] *The Pesaro*, 271 U. S. 562 (1926).

[4] In a careful study of the decision below a note in 47 Yale Law Journal 132, November 1937, reaches the conclusion (p. 135):

> "The rule in the instant case extends sovereign immunities into a field where they serve no useful purpose but defeat an underlying policy of another sovereign government [i.e. the United States]."

POINT II.

The Circuit Court of Appeals erred in holding that the giving of due effect to the Soviet assignment to the United States required it to disregard the statute of limitations of the forum.

The decision below seems to have been influenced in great part by the belief that the due control of international relations by the Federal Government requires a disregard of the state statute of limitations in this case (R., 458, 462, 91 F. [2d] at 900, 901-2). Words employed by this Court in *U. S.* v. *Belmont*, 301 U. S. 324, were quoted in support of that conclusion.

It is respectfully submitted that any such conclusion is an entire misapprehension of what this Court decided in the *Belmont* case. This fact would in itself require a review for the purpose of correcting the error.

In the *Belmont* case this Court expressly warned against any attempt to extend its precise holding there, saying (pp. 332-3, 337) that the decision dealt only with the case presented and the parties before the Court, did not affect adverse claims of others not parties, and did not foreclose the assertion of adverse claims to the fund involved. The case had come up by certiorari from a judgment dismissing the complaint upon its face. 85 F. (2d) 542. The sole question involved below and the sole question considered by this Court upon review was the public policy of New York and of the United States with regard to the *enforcement of foreign confiscatory decrees*. The defendant had no interest in the fund other than that of a custodian. This single fact was made the ground of the refusal of the Court to treat the question of public policy as properly raised (pp. 332, 337).

In the instant case defendant invokes, not a rule of policy either state or federal, but the statute law of New York made applicable in the United States courts by the statute law of

the United States.[1] In the instant case defendant is not a stakeholder, but a *bona fide* adverse claimant whose claim, maintained ever since February 25, 1918 (R., 128-129), is set forth in the findings of the District Court (R., 431) and acknowledged by the Circuit Court of Appeals (R., 456, 462 "adverse claim"; 91 F. [2d] at 899, 902).

In this obvious disparity between the cases, it would seem unnecessary to argue that the language used by the majority in the *Belmont* case does not constitute a rule of decision for the instant case. That language was to the effect that in an action to enforce an undertaking by the United States in pursuance of the conduct of foreign relations,

> "state constitutions, state laws and state policies are irrelevant to the inquiry and decision."

These words obviously had reference to the definition of the public policy of New York as fixed by the State Constitution and laws which respondents in the *Belmont* case quoted in their brief.[2] It cannot possibly be inferred that this Court, in taking from that definition the phrase "state laws", decided or intended to decide that an action brought by the United States to recover upon a claim assigned to it by a foreign power, is free of the state statutes of limitations. For not only is it perfectly apparent that this Court in the *Belmont* case did not address itself to the present question at all; but the principle there announced could not apply to the present case, because the invocation of the statute of limitations by this defendant does not impede the conduct of foreign relations by the United States, while the defense of public policy raised in the *Belmont* case would have applied equally to every article of private Russian property involved in the Soviet assignment and so might have impeded the execution by the United States of that assignment.

---

[1] Rules of Decision Act, 28 United States Code §725, Rev. Stat. §721.

[2] Respondents' brief page 38, quoting *People* v. *Hawkins*, 157 N. Y. 1, 12:

> "The courts . . . have held that a state can have no public policy except what is to be found in its constitution and laws."

POINT III.

The Circuit Court of Appeals erred in disregarding the high public policy which attaches in both municipal and international law to the principle of repose embodied in prescription and limitations.

The doctrine of sovereign immunity, which in the opinion of the Circuit Court of Appeals militates against the defense of limitations, is one of the policy of the forum.[1] The doctrine of limitations is of longer standing in our law and rests on a plane of policy equally high, in that it is considered necessary to the administration of justice that legal disputes be settled while the evidence is fresh. In the history of our law statutes of limitation with respect to real property have been enforced since the twelfth century, and statutes of limitation with respect to choses in action since the sixteenth century.[2]

This Court has abundantly recognized the wisdom and policy of prescription and statutes of limitation, regarding them as vital to the welfare of society and as promoting repose by giving security and stability to human affairs.[3] In *Wood* v. *Carpenter* (1879), 101 U. S. 135, 139, this Court said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evi-

---

[1] Ernest Angell, "Sovereign Immunity", 35 Yale Law Journal 150, 152.

[2] *Brooklyn Bank* v. *Barnaby*, 197 N. Y. 210, 227 (1910).

[3] *U. S.* v. *Oregon Lumber Company*, 260 U. S. 290, 299 (1922); *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895); *Wood* v. *Carpenter*, 101 U. S. 135, 139 (1879).

> dence of rights, they supply its place by a presumption which renders proof unnecessary."

Hence this Court has consistently applied the principle of acquisitive prescription as between states of the Union in litigations affecting boundary.[1]

Even in international arbitrations, where no statutory period of prescription or limitation is available to bind the sovereign litigants, the principle of prescription and loss of rights by lapse of time is nevertheless fully recognized and is based upon "practical considerations of order, of stability, and of peace."[2] As is said by Wharton:

> "It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law, but of all other systems of civilized jurisprudence. It is good for society that there should come a period when litigation to assert alleged rights should cease; and this principle, which thus limits litigation when wrongs are old and evidence faded, is as essential to the administration of justice as is the principle that sustains litigation when wrongs are recent and evidence fresh."[3]

Hence even in international arbitrations claims are barred for lapse of time.[4] While there are a few exceptions to the

---

[1] *Rhode Island* v. *Massachusetts*, 4 How. 591, 639 (1846); *Indiana* v. *Kentucky*, 136 U. S. 479, 510 (1890); *Louisiana* v. *Mississippi*, 202 U. S. 1, 53 (1906); *Maryland* v. *West Virginia*, 217 U. S. 1, 42 (1910); *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1925).

[2] Rules of prescription adopted by Institute of International Law, Annuaire (1925) page 558; 19 Am. Journ. Int. Law 760. See Resolutions I and IV.

[3] Note in 3 Wharton International Law Digest (2nd ed.) 972 § 239 Appendix, quoting this Court's language in *Wood* v. *Carpenter*, 101 U. S. 139.

[4] *Mossman Case*, Mexican-American Claims Commission of 1868, Moore Int. Arb. page 4180; *Williams Case*, American-Venezuelan Claims Commission of 1885, Moore Int. Arb. page 4181; *Cadiz Case*, American-Venezuelan Claims Commission of 1885, Moore Int. Arb. pages 4199, 4203; *Spader Case*, Venezuelan Arbitration of 1903, page 161; *Gentini Case*, Venezuelan Arbitration of 1903, page 720; *Sarropoulos* v. *Bulgaria*, 7 Recueil T. A. M. (1928) 51.

general rule of the application of prescription to sovereign states, those exceptions may be reduced merely to a holding that municipal statutes of limitations do not run in international tribunals or that the sovereign litigants waive prescription by executing a submission to arbitration.[1] The general rule remains, as stated by the Mixed Arbitral Tribunal in *Sarropoulos* v. *Bulgaria*, 7 *Tribunaux Arbitraux Mixtes* 47, 51 (1927):

> "Prescription, an integral and necessary part of every system of law, must be admitted in international law."

The long acceptance and firm establishment of this rule even in litigation between sovereigns, and the high public policy which the Court of the forum has always recognized as inherent in it, should be determinative of the question here presented. Even as to the local sovereign, exemption from the operation of the rule has been denied by this Court where state statutory restrictions of remedial rights involve a recognized policy:

Fink v. *O'Neil*, 106 U. S. 272, 280 (1882);
U. S. v. *Knight*, 14 Pet. 301, 315 (1840);
U. S. v. *Harpootlian*, 24 F. (2d) 646, 649 (C. C. A. 2, 1928).

---

[1] The two instances noted by the Circuit Court of Appeals, R. 465, 91 F. (2d) at 903, are among these exceptions. With reference to the *Cook* case, the Editor's note in Annual Digest of Public International Law Cases 1927-8, page 265, states that extinctive prescription has long been recognized by a series of international awards. In *The Pious Fund of the Californias*, For. Rel. 1902, App. II, page 63, the brief of the United States argues that Mexico's execution of the submission to arbitration was a waiver of the defense of limitations.

CONCLUSION.

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

Dated, New York, N. Y., November 8, 1937.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 9 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1937

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

THE BALLOU PRESS NEW YORK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937
No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

To correct certain apparent misstatements in the opposing brief of the United States, the petitioner craves leave to submit the following brief statement in reply.

1. *Findings below.* At page 5 the brief of the United States erroneously says that the District Court did not purport to make a final determination of the facts of an unequivocal repudiation of the debt, and says that there were no formal findings of fact or trial of the issue. This is a complete misapprehension of the practice in New York pursuant to which (as shown in our prior brief, pp. 12-13) the complaint may be dismissed upon affidavits showing that there is no issue of fact with respect to certain affirmative

defenses, including the statute of limitations. Under that practice no formal findings as after a trial are required, because the Court finds that there is no issue of fact. Judge Caffey so found here. See at R., 421-32, where he discusses the facts. At R., 421 he says:

> "Is there a triable issue of fact? Or are the facts, insofar as they are material or it is essential for them to be determined, without serious or substantial dispute?"

At R., 431-2 he sets forth eight conclusions of fact as flowing from the evidence "without dispute."

This is as full, final and formal a determination upon the facts as could possibly be had after the most extended trial. It was not reversed, modified or disturbed by the Circuit Court of Appeals.

2. *Contentions of the United States rejected.* In the District Court and in the Circuit Court of Appeals the United States made exactly the same argument made on pages 7-8 of its brief in opposition to certiorari to the effect that the petitioner's unequivocal refusal to pay the debt had not been conclusively determined. The District Court rejected this contention. The Circuit Court of Appeals ignored it, although it constituted Point I, pages 15-24 of the brief of the United States in the Circuit Court of Appeals.

In ignoring the contention of the United States, the Circuit Court of Appeals necessarily rejected it, because otherwise that Court would not have reached the question which it decided, namely the running of the statute of limitations against a foreign sovereign. So with the other point which the brief of the United States (p. 9) says the Circuit Court of Appeals did not consider, viz. the acts of Bakhmeteff and Ughet as binding the State of Russia. That point had previously been determined in favor of the petitioner's position (as pointed out in our petition, p. 6), and the Circuit Court of Appeals necessarily decided it also adversely to the

United States in order to reach the question passed on in this case as to the application of the statute of limitations to a foreign sovereign.

3. *Misstatement as to the record.* At page 8 of the brief of the United States the writer goes so far as to say that the present record is inadequate and deficient as a final and complete presentation of all of the facts of repudiation of the debt because it consists "entirely of affidavits based on information largely in the petitioner's control", without any opportunity to the respondent to cross-examine. This prejudicial statement is untrue. Reference to the record will show that the two principal items of proof as to the accrual of the cause of action were the *depositions* of Ughet (R. 17-68) and Bakhmeteff (R. 69-107). The United States cross-examined as to both (R. 59-60, 67, 92-7, 98-100, 104-7). As to a third important witness the United States filed an affidavit of questions and answers constituting a cross-examination on the basis of his prior affidavit (R. 246-63).

Nor is it true that the information as to the accrual of the cause of action was "largely in the petitioner's control". The chief officer of the petitioner who had direct knowledge as to its repudiation of liability was the former President of the petitioner, Charles H. Sabin, who died before the institution of the action (R. 130). The evidence on the subject was produced from independent witnesses, chiefly by deposition. Some of the evidence showing a repudiation of liability by the petitioner was produced by the United States itself (e. g. R. 229, 239, 326). At least 150 pages of the record (R. 211-362) are occupied by the proof put in by the United States, including files produced from the Treasury Department and the State Department.

4. *Finality of the question of limitations.* The brief of the United States erroneously says (p. 7) that the question of limitations does not dispose of this case and that the petitioner admits there are other issues herein. The defense of limitations is of course decisive of the case if decided in

accordance with the conclusions of the District Court, which entered a final judgment in favor of the petitioner. If the defense is well taken the case is at an end. The brief of the United States does not attempt to answer the considerations stated at page 9 of our petition showing the propriety of a determination here of the defense of limitations before a protracted trial on the only other issue in the case.

5. *Conflict of decisions.* Since the filing of the petition there has been published the decision of the Circuit Court of Appeals for the Ninth Circuit in *U. S.* v. *Moscow-Idaho Seed Co.*, 92 F. (2d) 170, holding that the United States as plaintiff is subject to the affirmative defense of contributory negligence. At page 173 the Circuit Court of Appeals for the Ninth Circuit said, on the authority of language used by this Court in *Luckenbach Steamship Co.* v. *Norwegian Barque Thekla*, 266 U. S. 328, 339, 340:

> "When the United States comes into court and institutes a suit for redress, not based on any infringement of its sovereignty and not for any violation of its governmental prerogatives, and submits a claim wholly in the nature of a private litigant, it, by implication, waives any immunity as sovereign and its adversary is entitled to set up any defense which would be available to him were his opponent another citizen instead of the government."

CONCLUSION.

This case involves matters of novel impression and first importance which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed in the petition.

Respectfully submitted,

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

Dated, New York, N. Y., December 8, 1937.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 7 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1937.

No. 566.

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

against

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

March 7, 1938.

THE BALLOU PRESS NEW YORK

INDEX.

PAGE

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATUTES AND EXECUTIVE AGREEMENT INVOLVED 3

STATEMENT OF THE CASE 3

DECISION OF THE DISTRICT COURT (R. 257-77) 8

DECISION OF THE CIRCUIT COURT OF APPEALS (R. 281-92, 91 F. [2d] 898) 10

SPECIFICATION OF ERRORS TO BE URGED 12

SUMMARY OF ARGUMENT 12

I. THE STATUTE OF LIMITATIONS OF THE FORUM BINDS FOREIGN SOVEREIGNS, AND AT THE TIME OF THE ASSIGNMENT OF THIS CLAIM TO THE UNITED STATES IT WAS BARRED BY LIMITATIONS 13

A. The principle upon which exemption from limitations has heretofore been accorded to local sovereigns is one limited in its nature to the sovereign of the forum and is not extensible to foreign states 14

B. In the history of the *nullum tempus* rule it has never been applied to any other than the local sovereign 20

C. All the decisions in this country on the subject indicate, and some have held, that foreign sovereigns are bound by limitations 23

D. The rule that a sovereign plaintiff must take the status of a private litigant involves submission of its claim to the local statute of limitations 35

E. The statute of limitations has long been recognized as a meritorious defense essential in the administration of justice 45

F. Allowance of the defense of limitations against a foreign sovereign's claim is no impairment of its immunity as heretofore understood 51

G. Prejudice to the petitioner from the lapse of time is apparent upon this record 66

Existence of recognized representatives of State of Russia authorized to bring suit 68

PAGE

II. When Outlawed in the Hands of the State of Russia, the Claim Here Involved Was Not Revived by Assignment to the United States 71

A. The claim barred in the hands of the assignor is barred in the hands of the assignee 72

B. The defense of limitations, once perfected as against the State of Russia through its government then recognized by the United States, was not destroyed upon recognition of a new government through any doctrine of retroactivity or relation back 75

III. The Assignment of the State of Russia to the United States Does not Override the State Statute of Limitations, and the Holding of this Court in the Belmont Case Has no Application Here 83

A. Neither the language nor the holding in the *Belmont* case authorizes the decision below 84

B. The exchange of letters of November 16, 1933, does not purport to override State and Federal statutes 87

Conclusion 91

Appendix I 92

Statutes and Executive Agreement involved 92

Appendix II 96

Cases Cited.

	PAGE
Administrator of Austrian Property v. Russian Bank for Foreign Trade, 48 T. L. R. 37	21
Administrator of Hungarian Property v. Finegold, 144 L. T. 670	21
Administration of Siberian Railroads v. Representative of the Superior Council of Peoples Economy, Supreme Court, Civil Cass. Collegium, R. S. F. S. R. No. 31470 (1924), Coll. of Decisions of Civil Cass. Collegium Supreme Court R. S. F. S. R. (1929) No. 40, page 51	113
Antelope, The, 10 Wheat. 66	58
Armstrong v. Morrill, 14 Wall. 120	20
Ash's Estate, In Re, 202 Pa. St. 422	32
Bagley v. Wallace, 16 Serg. & R. 245 (Pa.)	21
Barclay v. Russell, 3 Ves. Jr. 424	39
Beatrice, The, 36 L. J. Adm. 10	40
Bell v. Morrison, 1 Pet. 351	46
Berizzi Brothers v. The Pesaro, 271 U. S. 562	71
Blazier v. Johnson, 11 Neb. 404	21
Boone Co. v. Burlington &c R. R., 139 U. S. 684	20, 34
Bowers v. New York etc. Lighterage Co., 273 U. S. 346	32
Brooklyn Bank v. Barnaby, 197 N. Y. 210	45
Cadiz case, 4 Moore Int. Arb. p. 4199	48, 49
Campbell v. Haverhill, 155 U. S. 610	46, 53
Campbell v. Holt, 115 U. S. 620	53
Canadian Car & Foundry Co. v. American Can Co., 258 F. 363	7
Candish's, Sir William, case, 1 Plowd. 321	15
Candler v. Lunsford, 20 N. Car. 407	29, 43
Cary v. Whitney, 48 Me. 516	21
Cheney v. Ringgold, 2 Har. & Johns. 87 (Md.)	21
Chesapeake v. Delaware Canal Co. v. U. S. 250 U. S. 123	21
Coke's, Sir Edward, case, Godb. 289	15
Collac v. Yugoslav State, Ann. Dig. 1929-30, 9 Recueil T. A. M. 195	49
Colombian Government v. Rothschild, 1 Sim. 94	39
Commissioners of the Sinking Fund of Louisville v. Buckner, 48 F. 533	23, 25
Commonwealth v. McGowan, 7 Ky. 62	21
Commonwealth v. Miltenberger, 7 Watts 450 (Pa.)	21
Compania Española de Navegacion Maritima S. A. v. SS. Navemar, 90 F (2d) 673, No. 242, Sup. Ct. Jan. 31, 1938	57
Cook, George W. case, Ann. Dig. 1927-8, No. 174, Ralston, Supplement to the Law and Procedure of International Tribunals (1936), p. 185	50
Cooke v. U. S., 91 U. S. 389	20, 33
County of St. Charles v. Powell, 22 Mo. 525	34
Cressey v. Meyer, 138 U. S. 525	27
Dame de Latude et al. v. S.S. Leon XIII et al., Clunet (1892) page 447 (1893) page 731, 26 A. J. I. L. Supp. 1932 page 595	106
Davis v. Corona Coal Co., 265 U. S. 219	21
Davis, The, 10 Wall. 15	35
De la Torre v. Bernales, 1 Ves. Jr. Hov. Supp. 149	62

PAGE

Decision of Presidium of Supreme Court of RSFSR, Collection of Interpretations of the Supreme Court of the RSFSR (State Law Publishing Concern Moscow, 1930, p. 45) 113
Decisions of the Cassation Collegium RSFSR June 17, 1929, Case No. 3854 113
Departamento del Tolima v. The Dorado Extension Railway, Ltd., 38 Gaceta Judicial 418 101
Dollar Savings Bank v. U. S., 19 Wall. 227 ..... 30, 31
Dougherty v. Equitable Life Assurance Society, 266 N. Y. 71 .. 77, 86
Douglas Co. v. City of Lawrence, 102 Kan. 656 34
Dox v. Postmaster General, 1 Pet. 318 20
Duke of Brunswick v. King of Hanover, 6 Beav. 1 63
Dupont deNemours & Co. v. Davis, 264 U. S. 456 21
Emperor of Brazil v. Robinson, 5 Dowl. 522 40
Explanation of Plenum of Supreme Court of RSFSR Protocol No. 10, June 29, 1925 113
Fink v. O'Neil, 106 U. S. 272 ..... 17, 28, 33
Fisco con. Goyenechea, Gaceta de los Tribunales, 1889, volume II, p. 358 100
Fisco contra Saguier y Riquelme, Fallos y Disposiciones del Superior Tribunal de Justicia, 1899, p. 333 111
Fisco con. Urriaga, Gaceta de los Tribunales, 1883, p. 1129 100
French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 .. 18, 19, 20, 31
Gathright v. State, 129 Ark. 339 34
Gaussen v. U. S., 97 U. S. 584 20
Gentini case, Ven. Arb. of 1903, 720, Ralston, p. 378 48
Georgia v. Chattanooga, 264 U. S. 472 59
Gibson v. Chouteau, 13 Wall. 92 ..... 20, 28, 29
Gloria, The, 286 F. 188 57
Gouvernement espagnol v. Veuve et heritiers d'Aguado, Paris Court of Appeal (1867) Dalloz 1867 II 49 ..... 27, 105
Government of the French Republic v. Government of the Kingdom of the Serbs, Croats and Slovenes, Judgment No. 14, July 12, 1929, 2 Hudson World Court Reports 344 64
Grand Trunk Wn. R. Co. v. U. S., 252 U. S. 112 21
Green v. Rivett, 2 Salk. 421 45
Guarantee Co. v. Title Guaranty Co., 224 U. S. 152 19
Hemmer v. United States, 204 F. 898 37
Hepburn v. Ellzey, 2 Cranch 445 35
Herzog v. Brown, 217 N. Y. App. Div. 402 3
Hullett v. King of Spain, 2 Bligh N. S. 31 39
Humphrey v. The Queen, 2 Can. Exch. 386 ..... 21, 43
Indiana v. Kentucky, 136 U. S. 479 ..... 31, 47
Inscription de bienes raices del Gobierno de Bolivia, Gaceta de los Tribunales, 1912, volume II, p. 813, 26 A. J. I. L. Supp. p. 584 100
Inverson v. Duboise, 27 Ala. 418 21
Kawananakoa v. Polyblank, 205 U. S. 349 61
Kemp v. Commonwealth, 1 Hen. & Munf. 85 (Va.) 21
King of Spain v. Hullett, 7 Bligh N. S. 359 ..... 41, 53, 60
King, The v. Morrall, 6 Price 24 73
Kingdom of Roumania v. Guaranty Trust Company, 250 Fed. 341, certiorari denied 246 U. S. 663 63

	PAGE
Lambert v. Taylor, 4 B. & C. 138	21
Land Oberoesterreich v. Gude, 19 F. Supp. 78	41
Lehigh Valley R. Co. v. State of Russia, 293 F. 133, 293 F. 135, aff'd 21 F. (2d) 396, writ of prohibition denied 265 U. S. 573, cert. den. 275 U. S. 571	55, 68, 78, 80
LeRoy v. Crowninshield, 15 Fed. Cas. No. 8269	65
Lightfoot v. Davis, 198 N. Y. 261	45, 53
Lindsey v. Miller, 6 Pet. 666	20, 28
Louisiana v. Mississippi, 202 U. S. 1	47
Lucas v. Pilliod Lumber Co., 281 U. S. 245	21
Luther v. Sagor & Co. [1921] 3 K. B. 352	77
Magdalen College case, 11 Co. Rep. 66b	14, 21
Marshall v. New York, 254 U. S. 380	59
Maryland v. West Virginia, 217 U. S. 1	47
May v. School District, 22 Neb. 205	34
M'Cluny v. Silliman, 3 Pet. 270	46
McNamee v. U. S., 11 Ark. 148	21, 23
Metropolitan R. Co. v. District of Columbia, 132 U. S. 1	20, 30, 34
Michigan v. Wisconsin, 270 U. S. 295	47, 48
Minturn v. U. S., 106 U. S. 437	20
Moitez v. The South Carolina Fed. Cas. No. 9697	63
Mossman case, 4 Moore Int. Arb. p. 4180	48
Musurus Bey v. Gadban [1894] 2 Q. B. 352	55
Nacion v. The Barranquilla Railway & Pier Company, Ltd., 28 Gaceta Judicial 252	101
Nacion v. Bechara Hermanos, 44 Gaceta Judicial 577	102
Nacion v. Gamboa Guzman & Co., 44 Gaceta Judicial 250	102
Nacion v. Guevara y Bourdon, 44 Gaceta Judicial 385	102
Nacion v. Pedrosa, 42 Gaceta Judicial 75	101
Nacion v. Trujillo, 42 Gaceta Judicial 228	102
Nacion v. Zapata, 28 Gaceta Judicial 96	101
Narkomprod v. Mosselprom, April 17, 1923, 2 Dec. V. A. K. (Supreme Arbitration Council) No. 98	114
Navemar, The, 90 F. (2d) 673, Sup. Ct. Jan. 31, 1938	56, 57
Newbattle, The, L. R. 10 P. D. 33	42, 52
New Hampshire v. Louisiana, 108 U. S. 76	48
Nimmo's Executor v. Commonwealth, 4 Hen. & Munf. 57 (Va.)	21
Oetjen v. Central Leather Co., 246 U. S. 289	77
Otho, King of Greece v. Wright, 6 Dowl. 12	40
Palmer, The Jane, 270 F. 609	44
Parks v. State, 7 Mo. 194	21, 30
Parlement Belge, The, L. R. 5 P. D. 197	42, 51, 58
Parmilee v. McNutt, 9 Miss. 179	21
People v. Brown, 67 Ill. 435	43
People v. Gilbert, 18 Johns. 227 (N. Y.)	17, 21, 29
People v. Hawkins, 157 N. Y. 1	86
People v. Van Rensselaer, 8 Barb. 189 (N. Y.)	21, 29
Phillips v. Commissioner, 283 U. S. 589	21
Pious Fund of The Californias, The, For. Rel. 1902, App. II	51
Prioleau v. United States, L. R. 2 Eq. 659	41, 61
Provincia de Buenos Aires v. Club Mar del Plata, 20 Jurisprudencia Argentina 575	97

PAGE
Provincia de Buenos Aires v. Compania Nacional de Grandes Hoteles, 20 J. A. 580 97
Provincia de Buenos Aires v. Ghibaudi, 34 J. A. 1434 98
Provincia de Buenos Aires v. Luro de Mezquita, 22 J. A. 54 98
Public Works Commissioners v. Pontypridd Masonic Hall Co. [1920] 2 K. B. 233 21
Queen of Holland v. Drukker [1928] Ch. 877 ..... 40, 58
Queen, The v. Black, 6 Can. Exch. 236 ..... 21, 43
Republic of Costa Rica v. Erlanger, L. R. 1 Ch. D. 171 ..... 40, 60
Republic of Honduras v. Soto, 112 N. Y. 310 ..... 39, 40, 60
Republic of Peru v. Weguelin L. R. 20 Eq. 140 ..... 40, 60
Rhode Island v. Massachusetts, 4 How. 591 47
Ricaud v. American Metal Company, 246 U. S. 304 77
Riddlesbarger v. Hartford Insurance Co., 7 Wall. 386 47
Rothschild v. Queen of Portugal, 3 Y. & C. Ex. 594 41
Royal Italian Government v. International Committee of Y. M. C. A., 273 N. Y. 468 ..... 23, 26
Ruling Senate of the Russian Empire
No. 60 of 1879 111
No. 858 of 1874 ..... 111, 112
No. 325 of 1879 111
No. 72 of 1879 111
Russian Government v. Lehigh Valley R. Co., 293 F. 133, 293 F. 135, aff'd 21 F. (2d) 396, writ of prohibition denied 265 U. S. 573, cert. den. 275 U. S. 571 ..... 7, 55, 68, 78, 80
Russian S. F. S. Republic v. Cibrario, 235 N. Y. 255 ..... 39, 54
Russian Volunteer Fleet v. U. S. 282 U. S. 481 91
Rustomjee v. The Queen, L. R. 1 Q. B. D. 487 21
San Pedro etc. Co. v. U. S., 146 U. S. 120 20
Sapphire, The (1870), 11 Wall. 164 ..... 39, 54, 81
Saratov Gubkomotdel v. Riazan-Ural R. R., May 3, 1923, 3 Dec. V. A. K. No. 106 114
Sarropoulos v. Etat bulgare, 7 Recueil T. A. M. 47 ..... 48, 49
Schmidt v. Merchants Despatch Transportation Co., 270 N. Y. 287. 46
Schooner Exchange, The, v. M'Faddon, 7 Cranch 116 ..... 51, 58, 63
Scotland, The, 105 U. S. 24 42
Security Savings Bank v. State of California, 263 U. S. 282 64
Siren, The, 7 Wall. 152 35
Smith v. U. S., 5 Pet. 292 20
Spader, Ven. Arb. of 1903, 161, Ralston, Law and Procedure of International Tribunals, p. 378 48
Stanley v. Schwalby, 147 U. S. 508 ..... 20, 21
State v. Arledge, 2 Bail. 401 (S. Car.) 21
State v. Fleming, 19 Mo. 607 ..... 21, 30
State v. Halter, 149 Ind. 292 21
State ex rel. Lott v. Brewer, 64 Ala. 287 21
State of Russia v. Bankers Trust Co., 4 F. Supp. 417, aff'd 83 F. (2d) 236, cert. den. 299 U. S. 563 ..... 7, 68
State of Russia v. National City Bank, 69 F. (2d) 44 82
State v. Sponaugle, 45 W. Va. 415 21
State of Wisconsin v. Pelican Insurance Co., 127 U. S. 265 58
Steele v. U. S., 113 U. S. 128 20

PAGE
Stoughton v. Baker, 4 Mass. 521 ..... 16, 21
Strousberg v. Republic of Costa Rica, 44 L. T. 198 42
Swan v. Lindsey, 70 Ala. 507 21
Swearingen v. U. S., 11 Gill. & J. 373 (Md.) 21, 22
Taylor v. Voss, 271 U. S. 176 ..... 32, 87
Tillman v. Guaranty Trust Company, 253 N. Y. 295 ..... 7, 56
Todok v. Union State Bank, 281 U. S. 449 ..... 89, 90
Troutman v. May, 33 Penn. State 455 21
Underhill v. Hernandez, 168 U. S. 250 ..... 76, 77
U. S. v. Alexandria, 19 F. 609 21
U. S. v. American Bell Telephone Co., 159 U. S. 548 21
U. S. v. Beebe, 127 U. S. 338 ..... 20, 23
U. S. v. Belknap, 73 F. 19 21
U. S. v. Belmont, 301 U. S. 324 ..... 11, 12, 13, 51, 53, 74, 83, 84, 85, 86, 87, 88, 91
U. S. v. Boyd, 15 Pet. 187 20
U. S. v. Brown, 247 N. Y. 211 ..... 21, 23, 26
U. S. v. Buford, 3 Pet. 12 72
U. S. v. California, 297 U. S. 175 19
U. S. v. Chaves, 159 U. S. 452 33
U. S. v. Curtiss-Wright Corporation, 299 U. S. 304 90
U. S. v. Dallas Military Road Co., 140 U. S. 599 20
U. S. v. Flint, Fed. Cas. No. 15,121 37
U. S. v. Harpootlian, 24 F. (2d) 646 ..... 33, 34
U. S. v Herron, 20 Wall. 251 19
U. S. v Hoar, 2 Mason 311, Fed. Cas. 15,373 ..... 18, 21, 28
U. S. v. Insley, 130 U. S. 263 20
U. S. v. Kirkpatrick, 9 Wheat. 720 ..... 17, 20, 29
U. S. v. Knight, 14 Pet. 301 ..... 17, 28, 33
U. S. v. Mack, 295 U. S. 480 21
U. S. v. Michigan, 190 U. S. 379 ..... 21, 32, 33
U. S. v. Minnesota, 270 U. S. 181 21
U. S. v. Moscow-Idaho Seed Co., 92 F. (2d) 170 ..... 35, 36, 52
U. S. v. Nashville etc. R. Co., 118 U. S. 120 ..... 17, 20, 28, 73
U. S. v. National City Bank, 83 F. (2d) 236, certiorari denied 299 U. S. 563 ..... 35, 44, 53, 74
U. S. v. New Orleans Pac. R. Co., 248 U. S. 507 21
U. S. v. Nicholl, 12 Wheat. 505 20
U. S. v. Nuestra Senora de Regla, The, 108 U. S. 92 54
U. S. v. Oregon Lumber Co., 260 U. S. 290 47
U. S. v. Paquete Habana, 189 U. S. 453 54
U. S. v. President etc. of the Manhattan Co., 276 N. Y. 396 ..... 53, 74
U. S. v. St. Paul &c. R. Co., 247 U. S. 310 21
U. S. v. Spiel, 8 F. 143 21
U. S. v. State Bank of North Carolina, 6 Pet. 29 59
U. S. v. Stinson, 197 U. S. 200 35
U. S. v. Thekla, The, 266 U. S. 328 ..... 35, 36, 52, 54, 57
U. S. v. Thompson, 98 U. S. 486 ..... 17, 20, 28, 30
U. S. v. Vanzandt, 11 Wheat. 184 20
U. S. v. Verdier, 164 U. S. 213 ..... 41, 69
U. S. v. Wagner, L. R. 2 Ch. App. 582 41

PAGE

U. S. v. White, 2 Hill 59 (N. Y.) 21
U. S. v. Whited & Wheless, 246 U. S. 552 21
U. S. v. Williams, 5 McLean 133, Fed. Cas. 16721 21
Utah Power & Light Co. v. U. S., 243 U. S. 389 ..... 21, 32
Walker v. United States, 139 F. 409 37
Weatherhead v. Bledsoe, 2 Overt. 352 (Tenn.) 21
Western Lunatic Asylum v. Miller, 29 W. Va. 826 23
Wilber National Bank v. U. S., 294 U. S. 120 33
Williams case, 4 Moore Int. Arb. p. 4181 ..... 48, 49
Wilson v. Hudson, 8 Yerg. 398 (Tenn.) 21
Wood v. Carpenter, 101 U. S. 135 47
Zappa case, 26 A. J. I. L. (1932) p. 593, 29 Clunet (1893) 727 ... 98, 107

Statutes Cited.

Act of February 26, 1788, Section X, Laws of New York 11th Session, Cap. XLIII 45
Argentina, Civil Code, Arts. 34, 3951 ..... 96, 97, 100
Belgium, Civil Code, Art. 2227 98
Bolivia, Civil Code, Arts. 31, 229, 333 99
Brazil, Civil Code, Arts. 13, 14, 163 99
Chile, Civil Code, Art. 2497 100
Code of 1848, §71, Laws of New York 1848, 71st Session, Chap. 379 45
Colombia, Civil Code, Art. 2517 101
Law 153 of 1887, Art. 80 101
Law 40 of 1933 101
Law 68 of 1920 101
Conformity Act, 28 United States Code §724, Rev. Stat. §914 ..... 3, 92
Constitution of the United States
Fifth Amendment 91
Art. II, §2 90
Art. VI, Clause 2 90
Costa Rica, Civil Code, Arts. 6, 15, 27 ..... 102, 103
Cuba, Civil Code, Arts. 35, 1932 103
Dominican Republic, Civil Code, Art. 2227 103
Ecuador, Civil Code, Art. 2479 104
France, Civil Code, Art. 2227, 910 ..... 105, 106
Guatemala, Civil Code, Arts. 15, 1050 ..... 107, 108
Haiti, Civil Code, Art. 1995 108
Holland, Civil Code, Art. 1991 108
Honduras, Civil Code, Arts. 56, 2265 ..... 108, 109
Italy, Civil Code, Art. 2114 109
Judicial Code §240(a) 2
Judiciary Act of 1789, §34 16
Limitation Act, 1623, 21 Jac. 1, c. 16 45
Mexico, Civil Code for Federal District and Territories, Arts. 25 1137, 1148 109
Montevideo Treaties on Private International Law (1889) .. 64, 96, 111
Montevideo Treaty on International Civil Law, Arts. 3, 51, 56 64, 96, 97, 99, 101, 116
Montevideo Treaty on Procedural Law, Art. 1 ..... 64, 97, 99, 101, 116

PAGE

New York Civil Practice Act
§15 ..... 56, 92
§48 ..... 55, 92
§54 ..... 25, 62, 93
Nicaragua, Civil Code, Art. 878 109
Pan-American Code of Private International Law, Arts. 31, 229, 333 ..... 57, 99, 103, 104, 108, 109, 110, 111, 115, 116
Panama, Civil Code, Arts. 38, 64, 1670 110
Paraguay, Civil Code, Arts. 34, 3951 110
Rules of Civil Practice of the State of New York, Rule 107 93
Rules of Decision Act, 28 United States Code §725, Rev. Stat. §721 ..... 3, 85, 92
Russia (Imperial): Civil Laws Volume X, Part 1, Code of Laws of the Russian Empire, Art. 694 Note, Annex Art. 1 ..... 111, 112
Russia (Soviet): Civil Code, Arts. 44, 68 ..... 112, 113
Salvador, Civil Code, Art. 2407 114
Spain, Civil Code, Arts. 35, 38, 1932 115
Uruguay, Civil Code, Arts. 21, 1194 116
19 U. S. Code § 1621 70
26 U. S. Code §§ 275, 276 70
26 U. S. Code § 474 70
26 U. S. Code § 566 70
26 U. S. Code § 1432 70
28 U. S. Code § 287 70
28 U. S. Code § 347(a) 2
28 U. S. Code § 724, Rev. Stat. § 914 92
28 U. S. Code § 725, Rev. Stat. 721 ..... 85, 92
Venezuela, Civil Code, Arts. 27, 2092 116

Other Authorities Cited.

Angell, Ernest, "Sovereign Immunity", 35 Yale Law Journal, 150 63
Assignment of State of Russia, November 16, 1933 ..... 82, 87, 93
Aubry & Rau, Droit Civil 105
Bacon's Abridgment 15
Blackstone Commentaries [Cooley 4th Ed. 1899] 16
Borchard, Diplomatic Protection of Citizens Abroad 47, 49
Bracton, De Legibus, Lib. ii, c.5, section 7 14
Cremers, Aantekeningen op. de Nederl.—Wetboeken 108
de Bustamante, A. S., Derecho Internacional Privado (Havana 1931) 57
deFreitas, A. T., Civil Code of the Argentine (Buenos Aires, 1909). 97
Gaius, Institutes 45
Hôtel du Souverain, Requetes [1777] 62
Justinian, Institutes 45, 62
Lasala-Llanas, Sistema de Derecho Civil Internacional e Interregional (Madrid, 1933) 115
Lauterpacht, Private Law Sources and Analogies of International Law 50

PAGE
New York Times 66, 67
Quintana, Actas y Tratados celebrados por el Congreso Internacional Sud-Americano de Montevideo 64
Ralston, Law and Procedure of International Tribunals..... 48, 49, 50
Restrepo-Hernandez, Julian, Derecho Internacional Privado (2nd Ed., Bogota, 1928) 101
Rules of Prescription adopted by Institute of International Law, Annuaire (1925), p. 558, 18 A. J. I. L. 760..... 49
Ryley, Placata Parliamentaria 62
Selden, John, Table Talk (Ed. Pollock 1927)..... 104
Sutherland, Constitutional Power and World Affairs..... 90, 91
Treaty of the Trianon, Article 239..... 50
Vattel, Law of Nations..... 31
Westlake, Private International Law (7th Ed.)..... 104
8 Wharton International Law Digest (2nd Ed.)..... 47
Wood on Limitation of Actions (4th Ed. 1916)..... 47
Yale Law Journal November 1937 Vol. 47, p. 132..... 32, 58

IN THE

Supreme Court of the United States

OCTOBER TERM 1937.

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

against

THE UNITED STATES OF AMERICA.

No. 566.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R. 257-74) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 281-91) is reported in 91 F. (2d) 898.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered August 23, 1937 (R. 292). The petition for a writ of certiorari was filed on November 9, 1937, and was granted on December 13, 1937 (R. 293). The

jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, 28 United States Code § 347(a), as amended by the Act of February 13, 1925.

Questions Presented.

By virtue of an assignment received from the State of Russia in 1933, the United States brought suit in the District Court for the Southern District of New York against the petitioner, a New York corporation, to recover a deposit account which the State of Russia had had with the petitioner prior to 1918 and which in 1918, upon notice to the State of Russia, the petitioner had set off to pay its own claims *pro tanto* against the State of Russia. The statute of limitations of the State of New York for this type of action is six years.

The questions are:

1. Is a foreign sovereign in an action at law in a United States court in New York subject to the defense of the general statute of limitations, applicable to all ordinary litigants, as established by the law of New York?

2. Is the indebtedness of a New York bank to a foreign state, in the form of a deposit account, entitled to any peculiar privilege or exemption of sovereignty in a municipal court of the United States whose jurisdiction is invoked by the depositor or its assignee?

3. Does the assignment of Russian funds in the United States, executed by the Soviet Government to the United States on November 16, 1933, override the statute of limitations of the State of New York?

Statutes and Executive Agreement Involved.

Appendix I of this brief, pages 92-5 below, contains the applicable New York statute of limitations, the procedural rules under which petitioner's motion to dismiss was made, the applicable portions of the Conformity Act and the Rules of Decision Act, and the executive agreement between the President of the United States and the Soviet Commissar for Foreign Affairs concluded November 16, 1933 (R. 3).

Statement of the Case.

The Action. This action was brought by the United States on September 21, 1934 (R. 2) to recover the sum of $4,976,722.78 alleged to have stood with the petitioner in a deposit account of the State of Russia opened on July 15, 1916, and assigned to the United States by the Government of the State of Russia on November 16, 1933 (R. 3). The petitioner was and is a banking corporation under New York law having its principal office and place of business in New York City (R. 3).

Upon motion of the petitioner based on affidavits in accordance with the New York practice[1], and upon proof showing that the petitioner had repudiated with notice any deposit liability to the State of Russia prior to 1922, Judge Caffey in the District Court applied the six-year statute of limitations, and dismissed the complaint (R. 257-77). The

[1] The New York practice (Rule 107, p. 93 below) provides that certain affirmative defenses, including the statute of limitations, may be heard and determined upon motion and affidavits. This is an adaptation to actions at law of the old equity practice of raising questions of law by a plea in bar. *Herzog* v. *Brown*, 217 N. Y. App. Div. 402, 404 (1926).

United States appealed. The Circuit Court of Appeals for the Second Circuit reversed the judgment of dismissal on the sole ground that the statute of limitations does not run against a foreign sovereign, Judge Chase dissenting without opinion (R. 281-92).

This Court granted certiorari (R. 293).

The Bank Account Here Involved. The deposit account in suit was opened by the Imperial Russian Government with the petitioner in July 1916 in the name of Section Etrangère Ministère des Finances (R. 175) meaning the Foreign Section of the Ministry of Finance of that Government. It was in every respect an ordinary commercial deposit. It had originated as the proceeds of a loan by a group of New York banks to the Imperial Russian Government (R. 227); but the account was overdrawn on July 2, 1917 (R. 80), and the entire balance thereafter created and now claimed in this action by the United States as assignee of the State of Russia is the proceeds of a deposit with the petitioner made July 12, 1917 by the Russian Financial Attaché Serge Ughet (R. 80, 110). Interest was credited and debited on the account monthly in accordance with ordinary commercial banking practice (R. 248). Drawings on the account were made by letter or cable from the Foreign Section, up to the time of the Soviet Revolution (R. 229). The latest payment by the petitioner out of the account in regular course of operations was made July 10, 1917 (R. 230). The latest instruction from the Foreign Section with respect to the account was received by the petitioner on August 25, 1917 (R. 229-30).

Revolution in Russia. The first Russian Revolution occurred March 16, 1917, and the resulting Provisional Government of Russia was recognized by the United States on

March 22, 1917 (R. 216-7). The account in suit continued to be operated by the petitioner in the same way as formerly upon the assurances of the same Russian Financial Attaché (R. 230, 253-4).

On November 7, 1917, occurred the second or Soviet Revolution. The resulting regime, first known as the Provisional Workers' and Peasants' Government (R. 217), was not recognized by the United States until November 16, 1933 (p. 93 below). After November 7, 1917, the petitioner permitted no withdrawals from the account in suit (R. 80, 230). The balance in the account as it stood on December 12, 1917, is the amount now claimed by the United States as assignee of the State of Russia (R. 3).

Petitioner's Claims against State of Russia. On December 27, 1917, the new revolutionary government in Russia enacted a decree nationalizing the Russian banks (R. 81). On February 3, 1918, it enacted decrees annulling the share capital of the banks and repudiating the loans of the Russian Government (R. 81). The petitioner had ruble accounts with various Russian banks which at the dollar valuation thereof carried on the books of the petitioner amounted to more than $9,000,000 (R. 81-2). Upon receiving from a representative in Russia information as to the Soviet decrees and further information that the Russian commercial banks had accordingly ceased to exist and that there was no hope of payment of the petitioner's accounts with them, the petitioner on February 25, 1918, closed the account in suit by transferring the credit balance therein to a new consolidated account (R. 81-2). In this consolidated account the account in suit together with dollar accounts of Russian banks was merged and set off against the amounts

owed by Russian banks to the petitioner (R. 81-2). The total amount owed by the Russian Government to the petitioner on February 25, 1918, was more than $9,000,000, while the total owed by the petitioner to the Russian Government, including the account in suit, was $7,226,000 (R. 82).

On March 14, 1918, this consolidation of accounts was expressly ratified and confirmed by the Executive Committee of petitioner's Board of Directors (R. 82-3).

Representation of the State of Russia in the United States. After the recognition of the Provisional Government of Russia by the United States, Serge Ughet was on April 7, 1917, appointed Financial Attaché to the Russian Embassy (R. 185). Mr. Ughet had since January 2, 1917, been a representative of the Ministry of Finance in the Russian Supply Committee in New York (R. 174-5). He continued to be recognized by the United States as Russian Financial Attaché until November 16, 1933 (R. 218, 194). During the absence of the Ambassador, Mr. Ughet was from December 3, 1918, to July 31, 1919, recognized by the United States as Chargé d' Affaires ad Interim (R. 186, 219).

Boris Bakhmeteff was received as Russian Ambassador on July 5, 1917 (R. 217, 186), and continued to be recognized as such Ambassador until his resignation effective June 30, 1922 (R. 218-9). Upon his resignation he vested the custody of the Russian Government's property in this country in Mr. Ughet (R. 191-3), and Mr. Ughet's diplomatic status with the United States was not considered by the State Department to be altered by the termination of the Ambassador's duties (R. 246-7).

In virtue of the recognition so accorded them by the political department, Mr. Bakhmeteff and Mr. Ughet were ex-

pressly held by the courts authorized to sue on behalf of the State of Russia to recover its assets in this country.[1]

Accrual of Cause of Action. After November 7, 1917, and before June 30, 1922, Mr. Bakhmeteff as Ambassador and Mr. Ughet as Financial Attaché of the recognized Russian Government made various attempts to obtain possession of the account in suit for the purpose and the use of their Government. These transactions are set forth in the depositions of the Ambassador (R. 43-68) and of the Financial Attaché (R. 9-43), taken by order pursuant to the New York practice in lieu of their affidavits, upon notice and with full cross-examination, and are also set forth in the uncontradicted affidavits of the Assistant Financial Attaché, Mr. Ter-Assatouroff (R. 69-73, 151-63, 230-5) and of officers and of former officers of the petitioner. Upon the evidence adduced in the District Court, Judge Caffey found that there was *no dispute* with respect to the accrual of the cause of action in favor of the State of Russia on at least six separate occasions prior to June 30, 1922. The New York statute of limitations as construed by the highest court of New York begins to run upon an unequivocal repudiation or denial of liability by a bank as well as upon a demand and refusal. *Tillman* v. *Guaranty Trust Company* (1930) 253 N. Y. 295.

---

[1] *Russian Government* v. *Lehigh Valley R. Co.*, 293 F. 133, 293 F. 135 (D. C. S. D. N. Y. 1919), affirmed 21 F. (2d) 396, certiorari denied 275 U. S. 571; *State of Russia* v. *Bankers Trust Company*, 4 F. Supp. 417, 419 (D. C. S. D. N. Y. 1933), affirmed 83 F. (2d) 236, certiorari denied 299 U. S. 563. See also *Agency of Canadian Car & Foundry Co.* v. *American Can Co.*, 258 F. 363 (C. C. A. 2, 1919).

Decision of the District Court (R. 257-77).

Judge Caffey in his opinion reviewed the conceded facts with reference to the recognition by the United States of the various Russian governments, the representation of Russia in this country, the establishment of the account in suit, and the set-off thereof by the petitioner in payment of its claims against Russia (R. 257-9).

He then discussed the evidence in order to ascertain whether there was a triable issue of fact or whether the facts, in so far as material, were "without serious or substantial dispute." Reviewing the evidence in detail he found:

1. That Mr. Bakhmeteff as Ambassador knew that the petitioner had taken the set-off and refused to surrender the account (R. 261-2). This finding is based upon the express and uncontradicted testimony of Mr. Bakhmeteff:

> "I would say what I knew was this: that the reason, or all of the reason, why they [the petitioner] refused to give this money was the fact that they made that offset." (R. 56.)

2. That Mr. Bakhmeteff was informed by letter from his counsel dated September 23, 1921 (R. 148-9) that the petitioner refused to give up the account in suit (R. 262).

3. That Albert Breton, a Vice-President of the petitioner, had informed Mr. Ughet prior to June 15, 1919, that the petitioner would not transfer the account in suit because it had taken it as a set-off (R. 262). This finding rests in part upon a letter produced by the United States in which a Federal Reserve Board officer informed the Treasury under date of May 7, 1918, that Mr. Breton had advised him of the set-off (R. 200-1).

4. That about June 16, 1919, Harold Stanley, a Vice-President of the petitioner, stated in the presence of Mr. Ughet that the account in suit was not available for use of the Russian State because Russia owed the petitioner a sum in excess thereof (R. 263).

5. That by letter of July 1, 1919, to his counsel (R. 140) Mr. Ughet said that the petitioner had refused to pay the account in suit because of the seizure of the petitioner's funds by the Bolsheviks (R. 263). Judge Caffey found this to be

> "an express admission in writing by Ughet that on or prior to July 1, 1919, the bank had unequivocally repudiated liability."

6. That upon attempting through one John H. Fulton as Chairman of a Protective Committee to draw $1,625,000 out of the account in suit for payment of interest on a Russian loan, Mr. Ughet was informed by letter of July 11, 1919, that the petitioner refused to pay (R. 263-4).

Finding these clearly established instances of unequivocal repudiation of liability by the petitioner communicated to the Russian Ambassador and the Financial Attaché, the District Court concluded that there was no triable issue of fact.

He then took up the questions of law. With respect to these he held—

First, that notice of repudiation to the Russian Ambassador and the Russian Financial Attaché bound the Russian State and set the statute of limitations running (R. 268-71).

Second, that the statute of limitations runs against a foreign sovereign, inasmuch as the reasons of public policy

which avail to exempt the local sovereign therefrom have no application to a foreign sovereign (R. 271-2).

Third, that prior to November 16, 1933, the United States had no legal interest in the account in suit (R. 272-3).

Fourth, that recognition of the Soviet Government is not retroactive in such sense as to destroy a perfected or completed act or right accruing within the territorial limits of the United States, such as the running of the period of limitations (R. 273-4).

Fifth, that there was no suspension of the statute of limitations after it began to run (R. 274).

The District Court therefore held that before recognition of the Soviet Government and before its assignment of the account in suit to the United States the six-year statute of limitations had run and had completely barred, in favor of the petitioner, the cause of action sued on.

Decision of the Circuit Court of Appeals (R. 281-92, 91 F. [2d] 898).

The decision of the Circuit Court of Appeals reversing the judgment of dismissal turned on a single point, namely the question whether the statute of limitations runs against a foreign sovereign. Judge Swan wrote the opinion of the Court, and Judge Manton concurred with an opinion. Both recited the proceedings below and the findings of the District Court with respect to the accrual of the cause of action. Both predicated the decision of the Circuit Court on the single question of the running of limitations against a foreign sovereign. Judge Swan said (R. 282, 91 F. [2d] at 899):

> "The question whether a foreign sovereign is affected by a State statute of limitations is one upon which no direct authority has been found."

Judge Manton said (R. 286, 91 [2d] at 900):

> "The question for us to determine is whether the right of the Russian Government to the moneys here involved had been outlawed at the time that government executed its assignment of such moneys to the United States on November 16, 1933."

Neither judge could, of course, have arrived at that question without first coming to the conclusion that the District Court was right in finding that there was no triable issue with respect to the accrual of a cause of action. If there had been a triable issue in that respect, the Circuit Court of Appeals would have sent the case back for trial. The United States as appellant had urged as Point I of its brief in the Court of Appeals, pages 15-24, the existence of a question of fact in the case. This contention the Circuit Court of Appeals rejected in deciding the question of law with respect to the running of limitations against a foreign sovereign.

On this point Judge Swan analyzed the cases, found no controlling authority, and held that the principle that a sovereign ought not to suffer from the negligence of his officers and servants cannot be abrogated by state legislation with respect to a foreign sovereign any more than it can with respect to the United States (R. 282-4, 91 F. [2d] 898-900). He cited *U. S.* v. *Belmont,* 301 U. S. 324, as justifying this conclusion. He held that to exempt from limitations the United States but not a foreign sovereign is to accord to the latter less than full sovereign rights, and that such a question is one pertaining to international relations over which the national government has complete control.

Judge Manton in his concurring opinion (R. 285-91, 91 F. [2d] at 900-3) treated the same question on the plane of sovereign immunity. He also quoted the language of this Court in *U. S.* v. *Belmont* in support of his conclusion.

Judge Chase dissented without opinion (R. 284, 91 F. [2d] at 900).

Specification of Errors to be Urged.

1. The Circuit Court of Appeals erred in holding that the statute of limitations of the forum does not bar a foreign sovereign.

2. The Circuit Court of Appeals erred in holding that the giving of due effect to the Soviet assignment to the United States required it to disregard the statute of limitations of the forum.

3. The Circuit Court of Appeals erred in reversing the judgment of dismissal.

Summary of Argument.

The statute of limitations of the forum runs against a foreign sovereign because the rationale of the exemption therefrom accorded to sovereigns is limited to the sovereign of the forum. The statute of limitations is binding upon all plaintiffs other than the domestic sovereign who invoke the jurisdiction, and the application thereof to foreign sovereigns effects no greater diminution of their dignity than any other rule of the forum which they accept upon invoking its remedies. The defense of limitations is favored

in the United States courts as subserving the interests of justice and wise policy.

By virtue of its transactions with the petitioner prior to June 30, 1922, the State of Russia was therefore barred under the law of New York and the United States at the time of the assignment by the State of Russia to the United States. The United States took no greater right by the assignment than its assignor had. The retroactivity accorded by this Court to the recognition of the Soviet Government on November 16, 1933, does not repeal or affect the perfected defense of limitations based upon transactions by the petitioner in the United States with the prior Government of Russia.

The assignment of the State of Russia to the United States is not a treaty in the constitutional sense, and could not and did not assume to repeal a State statute of limitations adopted by Congress for the United States courts. The holding in *U. S.* v. *Belmont,* 301 U. S. 324, does not affect the running of limitations upon claims assigned by the State of Russia.

I.

The statute of limitations of the forum binds foreign sovereigns, and at the time of the assignment of this claim to the United States it was barred by limitations.

The decision of the Circuit Court of Appeals for the Second Circuit in this case is the first decision in any court in all the world, so far as we have been able to ascertain, to the effect that a foreign sovereign is exempt from the

statute of limitations. It is the first case in which the exemption of the local sovereign, accorded by many cases in the English-speaking countries, has been broadened to apply to a foreign sovereign.

A. The principle upon which exemption from limitations has heretofore been accorded to local sovereigns is one limited in its nature to the sovereign of the forum and is not extensible to foreign states.

In the English cases the exemption of the sovereign from limitations or laches is predicated primarily on the prerogative of the Crown, only secondarily on public policy. The oldest statement of the rule in the books is probably that of Bracton, *De Legibus,* Lib. ii, c. 5, Section 7. Writing in the thirteenth century, Bracton describes certain items of common good appertaining to the King, such as the tax power, and then describes other things which appertain to the Crown as a matter of privilege,[1] such as wreckage of the sea, treasure trove, and fish royal. With respect to both these classes of items in the royal prerogative, Bracton says:

> "* * * for duration of time does not in this instance diminish the injury [to the King from loss of his right] but increases it, nor in the first instance nor in this does time run against the King, * * *."

In the *Magdalen College* case (1616) 11 Co. Rep. 66b, 74b, the Court said:

> "That where the King has any prerogative, estate, right, title, or interest, that by the general words of an Act he shall not be barred of them, as in the said case of

[1] *Quae pertinent ad coronam propter privilegium regis.*

reasonable aid, the King has an estate and interest in it, and therefore the general words of the Act of Westminster 1. cap. (36) 46. shall not extend to it. Also the King has a prerogative *quod nullum tempus occurrit Regi*, and therefore the general acts of limitation, or of plenarty, shall not extend to him; * * *"[1]

The rule of strict construction in the interest of the royal prerogative was stated by Hobart, L. C. J., in *Sir Edward Coke's* case (1624) Gobd. 289, 295:

"The King is *parens legum*, because the laws flowed from him: * * * The law amplifies everything which is for the King's benefit, or made for the King. If the King releaseth all his debts, he releases only debts by recognizance, judgment, obligation, specialtie, or contract: everything for the benefit of the King shall be taken largely, as everything against the King shall be taken strictly; and the reason why they shall be taken for his benefit is because the King cannot so nearly look to his particular, because he is intended to consider *ardua regni pro bono publico*. The prerogative laws is not the Exchequer law, but it is the law of the realm for the King, as the common law is the law of the realm for the subject: * * *."

By the time of Bacon's Abridgment (1736), the exemption of the Crown from limitations was more definitely expressed as a matter of policy than of privilege. Bacon says:[2]

"6. That no laches can be imputed to him; and therein, of the Maxim, *Nullum Tempus occurrit Regi*.

From the presumption that the king is daily employed in the weighty and public affairs of government, it hath become an established rule at common law, that no laches shall be imputed to him, nor is he in any way to

[1] See also *Sir William Candish's* case (1567) 1 Plowd. 321, where the rule *nullum tempus occurrit regi* was invoked to compel a settlement by the estate of the Royal Treasurer, and in the ensuing pardon "it was recited, for the maintenance of the prerogative, that the law was with the Queen in the case."

[2] Abridgment tit. Prerog. E 6.

> suffer in his interests, which are certain and permanent; and his privilege, *quod nullum tempus occurrit regi*, has been confirmed by the statute *de praerogativa regis*."

Similarly Blackstone said in his Commentaries (1753):[1]

> "In further pursuance of this principle [that the king is above the law] the law also determines that in the King can be no negligence or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions; for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subject."

The earliest authoritative discussion of the rule in the American cases is that of Mr. Justice Story in *U. S.* v. *Hoar*, Fed. Cas. 15,373 (1821). The Massachusetts court had already in *Stoughton* v. *Baker* (1808) 4 Mass. 521, on an issue of rights to land, held that (p. 528)

> "no laches can be imputed to the government, and against it no time runs so as to bar its rights."

Mr. Justice Story had to decide whether the statute of limitations of Massachusetts barred the United States as a plaintiff. He held that it did not, and that the Judiciary Act of 1789, § 34, making the laws of the several States rules of decisions in trials at common law in courts of the United States, did not cause the State statute of limitations to run against the national government. He based this conclusion on two grounds. In the first place he analyzed the history of the rule *nullum tempus* in English law, traced its origin to the royal prerogative, and concluded that in its modern phase it was essentially a rule of public policy. On this point he said (p. 330):

---

[1] Cooley, 4th Ed., 1899, Vol. 1, page 247.

"The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects (1 Bl. Comm. 247), is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments. We find accordingly, in our own state, the doctrine is well settled, that no laches can be imputed to the government, and against it no time runs, so as to bar its rights (Inhabitants of Stoughton v. Baker, 4 Mass. 528); so, that it is clear, that the statutes of limitations pleaded in this case would be no bar to a suit brought to enforce any right of the state in its own courts."[1]

The reason of public policy stated by Mr. Justice Story for the rule exempting the sovereign from limitations and laches, is that which this Court has repeatedly adopted since that time in its statement of the rule. See for example

U. S. v. *Kirkpatrick,* (1824) 9 Wheat. 720, 735;
U. S. v. *Knight,* (1840) 14 Pet. 301, 315;
U. S. v. *Thompson,* (1878) 98 U. S. 486, 489;
Fink v. *O'Neil* (1882) 106 U. S. 272, 281;
U. S. v. *Nashville etc. R. Co.,* (1886) 118 U. S. 120, 125.

Now it is manifest that the purpose thus subserved by the rule limits its application *to the local sovereign.* As a rule

[1] Likewise in *People* v. *Gilbert,* (N. Y. 1820) 18 Johnson 227, the New York court had held that the reason of the *nullum tempus* rule applies to a representative government, and that the attribute of sovereignty embodied therein had been acquired by the people of the State of New York from the King of Great Britain.

of public policy, it can be concerned only with the sovereign whose policy is involved. The policy of preserving the rights, revenues and property of the United States or of any State from injury and loss by the negligence of its officers, is one which concerns the United States and its citizens only. It is of small concern to it or to them that the public rights, revenues and property of Russia or of France or of any other country be saved from injury and loss by the negligence of their respective Ambassadors and Financial Attachés. The preservation of its property by the application of a similar rule might conceivably be part of the public policy of the foreign country concerned,[1] but by the same token cannot be part of the public policy of the United States.

So much was pointed out by this Court as a possible limitation on the rule *nullum tempus* in *French Republic* v. *Saratoga Vichy Spring Co.* (1903), 191 U. S. 427, 437, although it was held that the interest of the French Republic was there so remote as not to give rise to the contention. Reserving the point for later decision, this Court said (p. 437):

> "It is at least open to doubt whether the maxim *nullum tempus,* applicable to our own government, can be invoked in behalf of a foreign government suing in our courts. The doctrine is one of public policy, and is based upon the assumption that the officers of the government may be so busily engaged in the ordinary affairs of state as to neglect a vindication of its interests in the courts. Whether this exemption can be set up by a foreign government in the prosecution of suits against our own citizens—in other words, whether the latter are not en-

[1] As is shown in Appendix II, pages 96-116 below, the countries of continental Europe and of South America do not apply the rule *nullum tempus* to suits by their own governments. The assumed public policy which the United States in this case would extend for the benefit of a foreign sovereign, the State of Russia, is one which that State has not adopted for herself.

titled to the benefit of the ordinary defenses at law, is a question which does not necessarily arise in this case, and as to which we are not called upon to express an opinion."

The precise point does, however, arise in the instant case, and with respect to it the District Court made what in our submission is a correct application of the reason underlying the rule. Judge Caffey said, after quoting from the *Saratoga Vichy* case (R. 271):

> "As I see it, that reason has no application to a foreign sovereign. It seems to me that it would be monstrous, as matter of public policy, with respect to foreign states which come within our territorial limits and carry on business transactions, including, for example, the making of deposits in banks, to declare that such banks should be held in uncertainty and be denied opportunity to set up as a defense lapse of time, after they had repudiated liability, as a defense. There may be good reason, as matter of policy, why there should be disallowance of the defense as against the local sovereign; but I fail to see any reason why the same should be true so far as concerns a foreign sovereign. On the contrary, it seems to me that there is every reason of policy why it should not be true as to a foreign sovereign which has come into our country and made a deposit in one of our banks."

Reference to the other sources of the rule *nullum tempus* leads to the same result. Viewed in its origin as a perquisite of the King, it is necessarily limited to the King having dominion over the forum. Viewed in the light of the principle that the sovereign is exempted from the application of statutes unless expressly named therein, the rule *nullum tempus* again must be confined to the enacting sovereign. *U. S.* v. *California* (1936) 297 U. S. 175, 186.[1] In neither aspect, any

[1] The phrase used in *U. S.* v. *Herron* (1874), 20 Wall. 251, 261, and *Guarantee Co.* v. *Title Guaranty Co.* (1912), 224 U. S. 152, 156, is "sovereign authority of the country".

more than from the standpoint of its motivating policy, does the rationale of the rule exempting the sovereign from limitations and laches extend to foreign sovereigns who may avail of our courts.

B. In the history of the nullum tempus rule it has never been applied to any other than the local sovereign.

In their brief on behalf of the French Republic as petitioner in the *Saratoga Vichy* case, counsel for the French Republic stated their contention that laches should not be imputed to a foreign sovereign, and added (p. 44):

> "We regret to say that very diligent search has failed to bring to light any authorities which directly and in terms support this contention."

It is as true today as it was in 1903 that no authorities directly and in terms support the extended application of the *nullum tempus* rule which the Circuit Court of Appeals has adopted in this case. This fact we believe to be of some significance, in view of the numerous cases in which the rule has been stated, either as dictum or as direct holding, with respect to the domestic sovereign. These cases are set out in the margin.[1] While they include all the decisions on the point

---

[1] United States Courts. *U. S.* v. *Kirkpatrick*, 9 Wheat. 720, 735 (1824); *U. S.* v. *Vanzandt*, 11 Wheat. 184, 190 (1826); *U. S.* v. *Nicholl*, 12 Wheat. 505, 509 (1827); *Dox* v. *Postmaster General*, 1 Pet. 318, 325 (1828); *Smith* v. *U. S.*, 5 Pet. 292, 298 (1831); *Lindsey* v. *Miller*, 6 Pet. 666, 672 (1832); *U. S.* v. *Boyd*, 15 Pet. 187, 208 (1841); *Gibson* v. *Chouteau*, 13 Wall. 92, 99 (1871); *Armstrong* v. *Morrill*, 14 Wall. 120, 145 (1871); *Cooke* v. *U. S.*, 91 U. S. 389, 398 (1875); *Gaussen* v. *U. S.*, 97 U. S. 584, 590 (1878); *U. S.* v. *Thompson*, 98 U. S. 486, 488 (1878); *Minturn* v. *U. S.*, 106 U. S. 437, 444 (1882); *Steele* v. *U. S.*, 113 U. S. 128, 134 (1885); *U. S.* v. *Nashville etc. R. Co.*, 118 U. S. 120 (1886); *U. S.* v. *Beebe*, 127 U. S. 338, 344 (1888); *U. S.* v. *Insley*, 130 U. S. 263, 266 (1889); *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, 11 (1889); *U. S.* v. *Dallas Military Road Co.*, 140 U. S. 599, 632 (1891); *Boone Co.* v. *Burlington &c. R. R.*, 139 U. S. 684, 693 (1891); *San Pedro etc. Co.* v. *U. S.*, 146 U. S. 120, 135 (1892); *Stanley* v. *Schwalby*, 147 U.

with which we are familiar in this Court and in the English courts, the list of decisions in the State courts could be extended. As it is, the cases noted which announce the exemption of the *local* sovereign from the statute of limitations are 77 in number. Against them is to be set the com-

---

S. 508, 514 (1893); *U. S.* v. *American Bell Telephone Co.*, 159 U. S. 548, 554 (1895); *U. S.* v. *Michigan*, 190 U. S. 379, 405 (1903); *Utah Power & Light Co.* v. *U. S.*, 243 U. S. 389, 409 (1917); *U. S.* v. *Whited & Wheless*, 246 U. S. 552, 261 (1918); *U. S.* v. *St. Paul &c. Ry. Co.*, 247 U. S. 310, 314 (1918); *U. S.* v. *New Orleans Pac. R. Co.*, 248 U. S. 507, 518 (1919); *Chesapeake & Delaware Canal Co.* v. *U. S.*, 250 U. S. 123, 125 (1919); *Grand Trunk Wn. R. Co.* v. *U. S.*, 252 U. S. 112, 121 (1920); *Dupont deNemours & Co.* v. *Davis*, 264 U. S. 456, 462 (1924); *Davis* v. *Corona Coal Co.*, 265 U. S. 219 (1924); *U. S.* v. *Minnesota*, 270 U. S. 181 (1926); *Lucas* v. *Pilliod Lumber Co.*, 281 U. S. 245, 249 (1930); *Phillips* v. *Commissioner*, 283 U. S. 589, 602 (1931); *U. S.* v. *Mack*, 295 U. S. 480, 489 (1935); *U. S.* v. *Hoar*, 2 Mason 311, Fed. Cas. No. 15373 (1821); *U. S.* v. *Williams*, 5 McLean 133, Fed. Cas. 16721 (1850); *U. S.* v. *Spiel*, 8 F. 143 (D. C. Minn. 1881); *U. S.* v. *Alexandria*, 19 F. 609 (C. C. Va. 1882); *U. S.* v. *Belknap*, 73 F. 19 (C. C. Cal. 1896).

American State cases. *Kemp* v. *Commonwealth*, 1 Hen. & Munf. 85 (Va. 1806); *Cheney* v. *Ringgold*, 2 Har. & Johns. 87, 94 (Md. 1807); *Stoughton* v. *Baker*, 4 Mass. 521 (1808); *Nimmo's Executor* v. *Commonwealth*, 4 Hen. & Munf. 57 (Va. 1809); *Commonwealth* v. *McGowan*, 7 Ky. 62 (1815); *Weatherhead* v. *Bledsoe*, 2 Overt. 352, 357 (Tenn. 1815); *People* v. *Gilbert*, 18 Johns. 227 (N. Y. 1820); *Bagley* v. *Wallace*, 16 Serg. & R. 245 (Pa. 1827); *State* v. *Arledge*, 2 Bail. 401 (S. Car. 1831); *Wilson* v. *Hudson*, 8 Yerg. 398, 411 (Tenn. 1835); *Commonwealth* v. *Miltenberger*, 7 Watts 450 (Pa. 1838); *Parks* v. *The State*, 7 Mo. 194 (1841); *U. S.* v. *White*, 2 Hill 59 (N. Y. 1841); *Swearingen* v. *U. S.*, 11 Gill. & J., 373, 377 (Md. 1841); *Parmilee* v. *McNutt*, 9 Miss. 179, 184 (1843); *McNamee* v. *U. S.*, 11 Ark. 148 (1850); *People* v. *Van Rensselaer*, 8 Barb. 189, 197 (N. Y. 1850); *State* v. *Fleming*, 19 Mo. 607, 609 (1854); *Inverson* v. *Dubose*, 27 Ala. 418 (1855); *Troutman* v. *May*, 33 Penn. State 455 (1859); *Cary* v. *Whitney*, 48 Me. 516 (1860); *State ex rel. Lott* v. *Brewer*, 64 Ala. 287, 296, 299 (1879); *Blazier* v. *Johnson*, 11 Neb. 404, 409 (1881); *Swan* v. *Lindsey*, 70 Ala. 507, 519 (1881); *State* v. *Sponaugle*, 45 W. Va. 415, 431 (1898); *State* v. *Halter*, 149 Ind. 292 (1897); *U. S.* v. *Brown*, 247 N. Y. 211 (1928).

England. *Magdalen College Case*, 11 Coke Rep. 66, 75-a (1616); *Lambert* v. *Taylor*, 4 B. & C. 138, 152 (1825); *Rustomjee* v. *The Queen*, L. R. 1 Q. B. D. 487, 492, 496 (1876); *Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* [1920] 2 K. B. 233; *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade* (1931) 48 T. L. R. 37; *Administrator of Hungarian Property* v. *Finegold*, 144 L. T. 670 (C. A. 1931).

Canada. *Humphrey* v. *The Queen*, 2 Can. Exch. 386, 390 (1891); *The Queen* v. *Black*, 6 Can. Exch. 236, 253 (1899).

plete absence of any authority extending the exemption to foreign sovereigns.

In fact, the State courts in exempting from their statute of limitations the United States as the paramount sovereign have felt obliged to explain that the United States shared the local sovereignty and did *not* stand in the shoes of a foreign state. In *Swearingen* v. *U. S.*, 11 Gill. & J. 373, 377 (1841), the Supreme Court of Maryland said:

> "All bonds etc., taken in the name of the King, etc., are expressly excepted; and the State succeeding to the rights of sovereignty, stood, at the Declaration of Independence, in the place of the King, and being thus expressly excepted, when she surrendered certain powers of sovereignty to the *United States*, the exception must be considered as applying to such newly created government, thus clothed with portions of her sovereign power. To all claims springing out of the exercise of every sovereign power by the State, and which were due to the State, by express legislation, the doctrine of *nullum tempus* etc., was applied, and when portions of this sovereign power have been conferred upon another government, and claims spring out of the legitimate exercise of such powers, such newly created government, to the extent of the granted power, must and ought to be considered as standing in the place and stead of the State so granting them; and if the State would have been excepted from the operation of the statute, upon all claims she might have, from the exercise of any power which now has been granted away, the *United States*, in the exercise of them, is but the substitute of the State, and is entitled to the benefit of the exception likewise. *This interpretation of the act does not enlarge the exception, for it is as before, confined to the sovereign power, which is now by our constitutions parcelled out to two governments.*"[1]

This decision was cited by the Arkansas court in support of the same conclusion that the United States is not barred

[1] Italics supplied in last sentence.

by the local statute of limitations. *McNamee* v. *U. S.*, 11 Ark. 148 (1850). Similarly, in refusing to extend the exemption to private parties for whose benefit the local sovereign sued, this Court in *U. S.* v. *Beebe*, 127 U. S. 338, 347 (1888), described the immunity of the sovereign from limitations as an

> "exemption of the Government designed for the protection of the rights of the United States alone."

Thus both the principle and the application of the rule of exemption from limitations are restricted to the local sovereign.

C. All the decisions in this country on the subject indicate, and some have held, that foreign sovereigns are bound by limitations.

1. The only American decisions or dicta directly on the applicability of the local rule of limitations to foreign sovereigns indicate that the foreign sovereign is bound. These are

> *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326 (1887);
>
> *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 F. 533 (C. C. Ky. 1891);
>
> *U. S.* v. *Brown*, 247 N. Y. 211 (1928);
>
> *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468 (1936).

Western Lunatic Asylum v. *Miller* was an action by a Virginia quasi-public corporation brought in 1878 against the receiver and other representatives of the committed person, then deceased, to recover a balance due on account of board, etc., for the period 1850-63. The receiver showed that

he had paid over the funds in his hands to the heirs of the deceased insane persons, and pleaded the statute of limitations. The Supreme Court of Appeals of West Virginia passed principally on that question. It first pointed out that there was doubt as to whether plaintiff corporation, unless part of the government of Virginia, could claim the benefit of the maxim *nullum tempus*. But the Court went on (p. 329):

> "But conceding as claimed by the plaintiff, that this corporation and the Commonwealth of Virginia are one and the same, and that it must be treated here as possessing all the attributes and immunities which belong to the sovereign Commonwealth of Virginia, still, when Virginia seeks redress and becomes a suitor in the courts of this State and beyond her territorial limits, she must lay aside her attributes and immunities of sovereignty and assert her demands as private individuals or corporations assert theirs in those courts, subject to the same laws and limitations. Sovereignty, though supreme within its own jurisdiction and territory, does not extend beyond these; and when a sovereign State enters the courts of a foreign State, she does so with no other rights and immunities than those which pertain to private corporations or individuals. (*Esley* v. *People*, 23 Kan. 512.) The *lex fori* governs in the limitation of actions. (*Johnson* v. *Anderson*, 76 Va. 766.)"

After disposing of a contention that the claim had been transferred by Virginia to West Virginia, the Court continued (p. 331):

> "But, if we treat the State of West Virginia as the plaintiff and owner of the claim, the statute began to run as to her April 1, 1869, and her right of action ceased and the bar of the statute became operative, in April, 1874, before the repeal of the statute barring claims due to the State. For these reasons, it seems to me plain that the plaintiff, when this suit was instituted, had no existing legal demand against the estate of Irby,

and that its bill should have been dismissed by the Circuit Court."[1]

Commissioners of the Sinking Fund of Louisville v. *Buckner* was an action on behalf of the City of Louisville under a special act of Congress to recover from the estate of a Collector of Internal Revenue taxes alleged to have been illegally assessed and collected from a railroad company of which the City was a stockholder. While in form against the Collector's estate the action was really against the United States. The taxes involved were collected in and before 1872, while the act permitting the action to be brought was approved in 1890. Defendants demurred to the petition. Judge Barr in the Circuit Court sustained the demurrer on two grounds, except as to the statute of limitations. With respect to that he held that the two-year statutory bar for this type of action had been lifted, so far as concerned the United States, by the special act. In discussing this point he dealt with the claim made on behalf of the plaintiffs that they represented a foreign sovereign immune from limitations (48 F. at 536):

> "But if this action was a common-law one, for money had and received, we think the bar of the statute of limitation would apply to the plaintiffs' action, if nothing else appeared. Assuming that the holding of stock in the Louisville & Nashville Railroad Company by the city of Louisville is not merely a private property right,

[1] The rest of the opinion is devoted to a discussion of the rights of the parties upon the basis of a stipulation in the record. In its brief opposing certiorari the United States endeavored to distinguish this case by the statement that the local statute there also barred the local sovereign. This fact is immaterial for two reasons. In the first place, it relates merely to an alternative contention of the defendants, not to that involving the claim of the foreign sovereign as to which the West Virginia court used the language above quoted. In the second place, the New York statute also applies to the local sovereign. Civil Practice Act §54 at page 93 below.

but is a public right, and is the exercise of governmental powers pertaining to sovereignty, the maxim, *nullum tempus occurrit regi,* is not applicable. This maxim is applied only to the sovereign or government that has enacted the limitation act. If foreign nations, subjects or citizens thereof, or municipalities deriving their power from a country other than that which has the act of limitation, seek the tribunals of the latter country, they are not entitled to apply this maxim, and will not be excepted from the limitation, unless the act of limitation excepts them in terms. The states of this Union, as between each other, or as between them and the United States, are not excepted from acts of limitation as to bringing suits, by the application of this maxim."

In *U. S.* v. *Brown,* the New York court held that an action by the United States to recover an overpayment made by it in 1918 upon a charter party executed for it by the United States Shipping Board Emergency Fleet Corporation was not barred by the statute of limitations. After stating the rule that the United States is not subject to limitations in an action to recover public moneys, the Court said (247 N. Y. at 218):

"It is not a case where the government, wishing a recovery only authorized by a State statute, seeks to avoid a condition upon which such recovery is permitted. Nor is it a case where another State or a foreign government comes to us for relief."

This is a clear intimation that in the opinion of the New York Court of Appeals a foreign government, coming to the New York courts for relief, would be barred by the New York statute of limitations.

In *Royal Italian Government* v. *International Committee of Young Men's Christian Associations* the New York Court of Appeals affirmed without opinion a decision of the Appel-

late Division for the First Department, also rendered without opinion, granting a motion by the defendant to dismiss the complaint in an action by the Royal Italian Government on the ground that the cause of action set forth did not accrue within the time limited by law for the commencement of an action. The transactions sued on were had in 1918 and 1919, and the action dismissed was not commenced until 1935. While it appears to be true that the claimed immunity of the foreign sovereign with respect to the New York statute of limitations was not asserted by it until motion for reargument in the Appellate Division, the contention was presented at that time, was rejected by the Appellate Division, and was presented to and rejected by the Court of Appeals.

These four cases contain the only discussion which we have been able to find in courts of English-speaking countries regarding the precise point here involved.[1] They indicate a clear line of decision supporting the District Court in accordance with the plain rationale and purpose of the rule of *nullum tempus,* and are in accord with the universal practice abroad as exemplified in *Gouvernement espagnol* v. *Veuve et heritiers d'Aguado,* Paris Court of Appeal (1867) Dalloz 1867 II 49 and other authorities.[2]

---

[1] In *Cressey* v. *Meyer,* 138 U. S. 525 (1891) a creditor of the State of Louisiana sought to reach debtors of the State in a bill in the United States court. Louisiana intervened *pro interesse suo.* This Court held the action barred by limitation and laches. While holding that it was a personal action, it also intimated at page 528 that the suit would be treated in the federal courts as one by an individual against individuals even though in the courts of Louisiana the State might therein enforce all obligations due it regardless of the lapse of time. In other words, this Court, as an alternative ground of decision, held that the State of Louisiana appeared in the federal courts as a foreign sovereign subject to limitations.

[2] See Appendix II, pages 96-116 below.

2. The Circuit Court of Appeals, however, was influenced in the other direction (R. 283, 289; 91 F. [2d] at 899, 902) by a misinterpretation of a dictum announced by this Court in earlier cases. This dictum is the statement in *U. S.* v. *Nashville etc. R. Co.* (1886), 118 U. S. 120, 125, that the exemption of the United States from the statute of limitations when asserting rights as a sovereign government rests

> "upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided * * *."

From this Court's use of the words "applicable to all governments alike" it seems to have been thought that this Court intended to say that the public policy involved and the corresponding exemption from limitations apply to foreign sovereigns as well as to the domestic sovereign.

The error of any such belief is manifest upon tracing the language to its origin. The Court cited as authority for the language quoted

> *Fink* v. *O'Neil,* 106 U. S. 272, 281 (1882);
> *U. S.* v. *Thompson,* 98 U. S. 486, 490 (1878);
> *Gibson* v. *Chouteau,* 13 Wall. 92, 99 (1871);
> *U. S.* v. *Knight,* 14 Pet. 301, 315 (1840);
> *Lindsey* v. *Miller,* 6 Pet. 666, 673 (1832).

In all these cases except *Lindsey* v. *Miller* the phrase "applicable to all governments alike" in one form or another appears in the Court's statement of the rule *nullum tempus.* In two of them express reference is made, and in all of them the implied reference is, to the definitive discussion of Mr. Justice Story in *U. S.* v. *Hoar,* Fed. Cas. No. 15373 (1821) referred to at pp. 16-7 above. Mr. Justice Story, in show-

ing that the rule *nullum tempus,* while originating in the royal prerogative, was translated to the colonies and the States of America as in reality a doctrine of public policy, said:

> "And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments."[1]

In other words, the doctrine *nullum tempus* is one which the American States took over from the English common law because it is not a doctrine restricted to the monarchical system. There is no possibility of doubt that this is what Justice Story meant, and that this is all he meant, by the phrase "equally applicable to all governments" which, as repeated in the judgments of this Court, has been so signally misapplied in the instant case. In 1824 Mr. Justice Story wrote the opinion of this Court in *U. S.* v. *Kirkpatrick,* 9 Wheat. 720, in which he repeated that the maxim *nullum tempus* (p. 735)

> "is founded, not in the notion of extraordinary prerogative, but upon a great public policy."

In *Gibson* v. *Chouteau,* Mr. Justice Field first stated the principle in the English common law with reference to the King, then said that it "is applicable to all governments," and proceeded to hold that it is "upon this principle that in this country" the statutes of a State are restrictively construed.

---

[1] The same reasoning is found in the New York court at about the same time. *People* v. *Gilbert* (N. Y. 1820), 13 Johns. 227; see also *People* v. *Van Rensselaer,* 8 Barb. 189, 197 (1850). So the North Carolina court speaks of "the principle of the common law that the sovereign cannot be estopped, as a rule of justice and policy, equally applicable to our institutions as to those of the mother country." *Candler* v. *Lunsford,* 20 N. Car. 407 (1839).

In *U. S.* v. *Thompson*, Mr. Justice Swayne, after tracing the principle *nullum tempus* in English law, said (p. 489):

> "When the colonies achieved their independence, each one took these prerogatives, which had belonged to the Crown; and when the national Constitution was adopted, they were imparted to the new government as incidents of the sovereignty thus created. It is an exception equally applicable to all governments. (*U. S.* v. *Hoar*, *supra*; *The People* v. *Gilbert*, 18 Johns. (N. Y.) 227 * * *."

In *Dollar Savings Bank* v. *U. S.*, 19 Wall. 227, 239 (1873), Mr. Justice Strong used a variation of the phrase which makes the point even clearer. He stated the principle that the King is not bound by an act of Parliament unless specifically named therein and added:

> "The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different states, and practically [particularly?] in the federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution."

From all these cases it is perfectly clear that this Court has consistently employed the phrase "applicable to all governments alike," in connection with its statement of the rule *nullum tempus*, as an historical justification for the translation to this country of a privilege anciently considered in England to be part of the royal prerogative (pp. 14-5 above).[1]

---

[1] In recognition of the fact that they were dealing with a transplantation of the rule from a monarchical to a republican system, the courts have sometimes stated it as *nullum tempus occurrit reipublicae*. *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, 12 (1889); *State* v. *Fleming*, 19 Mo. 607, 609 (1854); *Parks* v. *State*, 7 Mo. 194, 196 (1841).

This Court did not say, and did not intend to imply, that the maxim *nullum tempus* was applicable to a foreign sovereign as well as to the local sovereign. In fact all the cases just discussed (except only *Dollar Savings Bank* v. *U. S.*, which did not treat the question of limitations) held merely that the *local* sovereign is not barred by the statute of limitations. Mr. Justice Field, who in *Gibson* v. *Chouteau* used the phrase "applicable to all governments" in connection with the rule *nullum tempus*, wrote the opinion in *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), in which he applied the doctrine of limitations in its positive form, i.e. in the form of acquisitive prescription, as against the State of Indiana. He there quoted with approval Vattel's language (p. 511):

> "Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."[1]

If by the phrase "applicable to all governments", so frequently used, this Court had implied that the rule *nullum tempus* extended to all sovereigns in our courts, it would not have intimated the doubt which it did intimate (p. 18 above) when the French Republic claimed the benefit of the rule in the *Saratoga Vichy* case. The Circuit Court of Appeals in our submission misconceived the significance of the phrase and gave it undue weight in reversing Judge Caffey. The expression "applicable to all governments alike" originated in the tracing of the maxim *nullum tempus* to its source in the English common law, and must be limited by the circumstances in which it was used, according to the

---

[1] Law of Nations Book 11 c. 11, §149. See the discussion below at pages 47-8 regarding the application of acquisitive prescription by this Court in litigation between States of the Union.

familiar rule of which this Court has often had occasion to remind counsel. *Taylor* v. *Voss*, 271 U. S. 176, 184 (1926).

3. Even as to the local sovereign, where the public policy underlying the rule *nullum tempus* really and properly applies, the tendency of decision and of legislation has been to limit the exemption from the statute of limitations.

In fourteen states of the Union, including New York, the local statute of limitations expressly provides that the State shall be barred thereby.[1] The Pennsylvania court, without a statute expressly barring the State and with recognition of the maxim *nullum tempus*, has nevertheless held that the presumption of payment from the lapse of time, as a rule of evidence affecting the burden of proof, binds the State. *In Re Ash's Estate*, 202 Pa. St. 422 (1902). The Court said of the presumption of payment:

> "It is of equitable origin, founded on experience of the ordinary course of business and human affairs, and adopted by the law in the interests of repose and the ending of litigation. There is no good reason why it should not apply to the Commonwealth just as other legal rules and presumptions do. And so it has been ruled."

This Court has in tax cases construed the rule *nullum tempus* strictly and against the local sovereign. *Bowers* v. *New York etc. Lighterage Co.*, 273 U. S. 346, 350 (1927). It has intimated the existence of exceptions to the rule even in the case of the local sovereign. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409 (1917); *United States* v.

---

[1] These states are Georgia, Idaho, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, South Carolina, Vermont, Virginia, West Virginia. Note on the decision below in Yale Law Journal November 1937, Vol. 47, p. 132. The New York statute is set out at page 93 below.

Michigan, 190 U. S. 379, 405 (1903). The rule *nullum tempus* will not be applied in commercial transactions. *Cooke* v. *U. S.,* 91 U. S. 389, 398 (1875); *Wilber National Bank* v. *U. S.,* 294 U. S. 120, 124 (1935). Even against the local sovereign the presumption of a grant by lapse of time will be indulged. *U. S.* v. *Chaves,* 159 U. S. 452, 464 (1895). In analogous cases this Court has refused to enforce a claimed right of the United States as the paramount local sovereign in contradiction of a state law.

Fink v. *O'Neil,* 106 U. S. 272 (1882);
United States v. *Knight,* 14 Pet. 301 (1840);
Cf. *United States* v. *Harpootlian,* 24 F. (2d) 646 (C. C. A. 2d, 1928).

In *United States* v. *Knight,* the Court held that the liability on a bond given to the United States for the liberty of the jail yard in the State of Maine should be determined in accordance with the applicable state law, and that an Act of Congress to that effect bound the United States although it was not named therein. In so holding this Court adverted to the rule *nullum tempus,* discussed its basis of public policy, and said that an Act of Congress which did not divest the public of any right but makes provisions in accordance with the previous policy of conforming to state legislation, should be construed to apply to the United States even though it was not named therein. 14 Pet. at 315. The language of Mr. Justice Barbour on this point is quoted in *Fink* v. *O'Neil* in support of the holding that the statute of Wisconsin exempting homesteads for levy and sale upon execution bound the United States as a judgment creditor although it was not expressly named.

Citing this decision the Circuit Court of Appeals for the Second Circuit in *United States* v. *Harpootlian* held that the United States as judgment-creditor was subject to the statutory limitation imposed by the New York practice upon the right to examine in supplementary proceedings, not as a strict statute of limitations but as a condition precedent not complied with. The Court said (24 F. [2d] at 649):

> "The doctrine of governmental immunity in the statute of limitations does not apply, and when the time of lien lapsed, within the terms of its grant, the government is in the same position as a private litigant."

Another illustration of restrictive interpretation of the *nullum tempus* rule, even as to the local sovereign, is the line of cases holding that the rule will not be applied to agencies or grantees of the local sovereign, such as municipalities, county boards, school districts, and the like, at least where specifically governmental rights are not involved:

Metropolitan R. Co. v. *District of Columbia,* 132 U. S. 1 (1889);

Boone County v. *Burlington etc. R. Co.,* 139 U. S. 684, 693 (1891);

Douglas Co. v. *City of Lawrence,* 102 Kan. 656, 659 (1918);

May v. *School District,* 22 Neb. 205 (1887);

County of St. Charles v. *Powell,* 22 Mo. 525 (1856);

Gathright v. *State,* 129 Ark. 339 (1917).

In *Metropolitan R. Co.* v. *District of Columbia* this Court held that the District of Columbia is subject to the statute of limitations of Maryland, that it is not a department of the United States government entitled to the immunity of

the paramount sovereign, and that it is governed by the rules of procedure between private persons, despite the fact that the District of Columbia (p. 9)

> "is a separate political community in a certain sense, and in that sense may be called a state",

and despite the fact that the District had been held to be a state according to the definitions of writers on general law. *Hepburn* v. *Ellzey*, 2 Cranch 445 (1805).

D. The rule that a sovereign plaintiff must take the status of a private litigant involves submission of its claim to the local statute of limitations.

The conventional immunity of sovereigns has long been qualified by the rule that, upon invoking the jurisdiction of a municipal court, the sovereign doffs its immunity and takes the position of a private litigant.

> *United States* v. *The Thekla*, 266 U. S. 328, 340, 341 (1924);
> *United States* v. *Stinson*, 197 U. S. 200, 205 (1905);
> *The Davis*, 10 Wall. 15 (1869);
> *The Siren*, 7 Wall. 152, 159 (1868);
> *United States* v. *Moscow-Idaho Seed Co.*, 92 F. (2d) 170 (C. C. A. 9, 1937);
> *United States* v. *National City Bank*, 83 F. (2d) 236 (C. C. A. 2, 1936), certiorari denied 299 U. S. 563.

In all these cases, except the last, the sovereign involved was the sovereign of the forum, who has always in this country and in England received immunity from the defense of limitations under the rule *nullum tempus*. Yet even

against the United States this Court permitted a recovery upon a cross-claim in admiralty, saying by Mr. Justice Holmes (*U. S.* v. *The Thekla*, 266 U. S. at 339-40):

> "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject-matter. The absence of legal liability in a case where, but for its sovereignty it would be liable, does not destroy the justice of the claim against it."

And at p. 341:

> "It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

Quoting this language the Circuit Court of Appeals for the Ninth Circuit has held the United States as plaintiff in a negligence action to be subject to the ordinary defense of contributory negligence. *United States* v. *Moscow-Idaho Seed Co.*, 92 F. (2d) 170. The court said at pages 173, 174:

> "When the United States comes into court and institutes a suit for redress, not based on any infringement of its sovereignty and not for any violation of its governmental prerogatives, and submits a claim wholly in the nature of a private litigant, it, by implication, waives any immunity as sovereign and its adversary is entitled to set up any defense which would be available to him were his opponent another citizen instead of the government.
>
> * * * * * * *
>
> The appellant having voluntarily selected the judicial forum wherein it has instituted a suit for damages to its Ford car arising out of an ordinary automobile collision has thereby consented that the court shall determine the matter in issue in accordance with the rules of law applicable to like controversies arising between private litigants."

Upon the principle thus enunciated and despite the well-settled rule of *nullum tempus* in favor of the local sovereign, the United States courts have on occasion held that even as to that sovereign the defense of laches and similar defenses apply. In *Hemmer* v. *United States*, 204 F. 898, 902 (C. C. A. 8, 1912) it was held that the United States was estopped in equity from repudiating representations made to certain grantees. At page 901 Judge Sanborn said:

> "This is a suit in equity. In such a suit the claims of the government appeal to the conscience of the chancellor with no greater or less force than those of a private individual under similar circumstances."

In *Walker* v. *United States*, 139 F. 409 (1905) the Alabama District Court held the United States to be estopped, saying upon a review of the English and American cases (p. 413):

> "The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man."

In *United States* v. *Flint*, Fed. Cases No. 15,121 (C. C. Cal. 1876) a court of three judges sustained demurrers to suits in equity by the United States to set aside certain land patents. Fraud in the obtaining of the patents was alleged. The bills were filed eight years after issuance of the patents, nineteen years after final decree in proceedings brought by the claimants for possession of the lands. The court sustained demurrers to the suits. Mr. Justice Field, sitting as a Circuit Judge, said (25 Fed. Cas. pp. 1113-4):

> "The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but

when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals * * *.

Although, on grounds of wise public policy, no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty, from this cause, of meeting objections which might, perhaps, at the time, have been readily explained; and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him.

* * * * * * *

Courts of equity will not entertain a suit to vacate a decree, even in case of palpable frauds, when there has been unnecessary delay in its institution, and the rights of third parties, as in this case, have intervened in reliance upon the decree. Considerations of public policy require prompt action in such cases, and if, by delay in acting, innocent parties have acquired interests, the courts will turn a deaf ear to the complaining party. This is the doctrine of equity, irrespective of any statute of limitations, and irrespective of the character of the suitor. It is essential that this doctrine should be vigorously upheld for the repose of titles and the security of property."

Now the emphasis laid by the courts upon the submission to the jurisdiction by a sovereign state as an assent to the rendition of justice between the parties, in all respects as if they were on an equal footing, is materially enhanced when the sovereign involved is a foreign state, not the local government, for the admission of foreign sovereigns as plaintiffs in municipal tribunals is entirely a matter of comity or

consent.[1] Originally the right of a foreign state to bring action in the English courts had been doubted. *Barclay* v. *Russell*, 3 Ves. Jr. 424 (1797). In the leading case of *Hullett* v. *King of Spain*, 2 Bligh N. S. 31 (1828) the right of the foreign sovereign to sue was put by the House of Lords in part upon the control which the forum would exercise over him as a suitor. At page 47:

> "That a King is entitled to sue as a King cannot be disputed. As a suitor he submits himself to the jurisdiction of the Court, otherwise it might be an objection that you could not control him. But if he comes here as a suitor, he submits himself to the jurisdiction. Has not the sovereign power of another country the common privilege of mankind?"

At page 57:

> "As to the objection that in the case of a sovereign justice cannot be done; if he appears as a Plaintiff, you can do complete justice—you can impose any terms you think proper—you have him in your power—you may file a crossbill, and then you have him completely under your control and jurisdiction."[2]

In the exercise of the control given to them by the submission to the jurisdiction of foreign states as plaintiffs, the courts have exacted terms in the interest of justice with respect to foreign sovereigns which have gone beyond those

---

[1] *The Sapphire*, 11 Wall. 164, 167 (1870); *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255, 262 (1923); *Republic of Honduras* v. *Soto*, 112 N. Y. 310, 311 (1889).

[2] In allowing a demurrer to a bill brought in the name of the Colombian Government with an insufficient description, Sir John Leach said:

> "A foreign State is as well entitled as any individual to the aid of this Court in the assertion of its rights: but it must sue in a form which makes it possible for this Court to do justice to the defendants. It must sue in the names of some public officers * * * who can be called upon to answer the cross-bill of the defendants."

Colombian Government v. *Rothschild* (1826) 1 Sim. 94.

exacted of the local sovereign. Thus foreign sovereign plaintiffs have been obliged to post security for costs, and to pay costs:

Republic of Honduras v. *Soto,* 112 N. Y. 310 (1889);
Emperor of Brazil v. *Robinson,* 5 Dowl. 522 (1837);
Otho, King of Greece v. *Wright,* 6 Dowl. 12 (1837);
The Beatrice, 36 L. J. Adm. 10 (1886);
Queen of Holland v. *Drukker* [1928] Ch. 877, 884.

In the *Drukker* case the Court said, in dismissing the action:

> "* * * as the sovereign State has submitted to jurisdiction by coming here I am in a position to order the sovereign State to pay the costs of the action."

In *Otho, King of Greece* v. *Wright,* the Court rejected the argument that the exaction of costs from a foreign sovereign would be an exercise of authority contrary to the comity of nations and to the courtesy displayed by independent sovereigns toward each other. At page 17 the Court said:

> "If a foreign prince sends over here to enforce his alleged rights in our courts, he must be subjected to the ordinary rules to which other suitors are liable, and more particularly in commercial dealings."

In *Republic of Honduras* v. *Soto,* the New York court pointed out that the Republic of Honduras, though a recognized foreign government, fell under the category of non-resident persons obliged to give security. In *Republic of Costa Rica* v. *Erlanger* (1875) L. R. 1 Ch. D. 171, 174, Blackburn, J., said that a foreign sovereign plaintiff "should, so far as the thing can be done, be put in the same position as a body corporate". To the same effect is *Republic of Peru* v. *Weguelin* (1875) LR 20 Eq. 140, 141.

In this respect a foreign state suing in the New York courts is in a position less privileged than the local sovereign. The local sovereign does not pay costs. *U. S.* v. *Verdier*, 164 U. S. 213, 219 (1896). Again the foreign sovereign has been held to be subject to discovery in equity as to all matters connected with any action instituted by the sovereign at law. In *Rothschild* v. *Queen of Portugal* (1839) 3 Y. & C. Ex. 594, 596, the Court said in allowing the discovery:

> "I am, therefore, of opinion that Her Most Faithful Majesty being a suitor voluntarily in a court of English law becomes subject, as to all matters connected with that suit, to the jurisdiction of this Court of Equity."

To the same effect are *United States* v. *Wagner* (1867) L. R. 2 Ch. App. 582, 592, 595; *Prioleau* v. *United States* (1866) L. R. 2 Eq. 659; *Land Oberoesterreich* v. *Gude*, 19 F. Supp. 78 (D. C. S. D. N. Y. 1937). And to his cross-bill against a foreign sovereign the defendant is entitled to have the sovereign answer under oath.[1] *King of Spain* v. *Hullett* (1833) 7 Bligh N. S. 359. Lord Brougham there said (p. 392):

> "A foreign sovereign is not sued here by a petition of right, nor does he sue by his attorney-general or government officer, but as a private individual. * * * The right of the King of Spain in respect of privilege in the courts of England, is not greater than that of any of his subjects. If he can bring his privilege with him, why may not his subjects also? One objects to answer upon oath; another may object to a trial by a jury of tradesmen. But if the king is recognized in the character of a suitor, must he not be content with the common fare of the court? * * * The more the question is

[1] Although from a respect to the dignity of the Crown the Court will not make the local sovereign answer upon oath. *Prioleau* v. *U. S.* (1866) L. R. 2 Eq. 659, 664.

> discussed the more clear it appears. The King of Spain sues here by his title of sovereign, and so he must be sued, if at all. But, beyond the mere name of sovereign, it has no effect. He brings with him no privileges which exempt him from the common fare of other suitors. The practice of the Court is part of the law of the Court."

So, where a foreign sovereign invoked the admiralty jurisdiction, he was obliged to give security for damages on a counterclaim. *The Newbattle* (1885) L. R. 10 P. D. 33. Brett, M. R., said at page 35, distinguishing *The Parlement Belge*, L. R. 5 P. D. 197 (1880):

> "It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign government to this extent."

Similarly this Court has held a foreign sovereign liable in admiralty to the reduction of its claim by application of the rule of limited liability. *The Scotland*, 105 U. S. 24, 31 (1881).

The scope and extent of the requirement of submission to the jurisdiction exacted of the foreign sovereign is well indicated by language used by James, L. J., in passing in *Strousberg* v. *Republic of Costa Rica*, 44 L. T. 198, 201 (C. A. 1881):

> "There is, in my opinion, but one exception, if it can be called an exception, to that rule, namely, that where a foreign sovereign or state comes into the municipal courts of this country for the purpose of obtaining a remedy; then, by way of defence to that proceeding—by way of counter-claim if necessary to the extent of defeating that claim—the person sued here may file a cross-claim, or take any other proceeding against that sovereign state for the purpose of enabling complete justice to be done between them. That is what was done in all those cases of the United States and others, and

> that is to my mind, the only instance in which anything in the nature of process against a foreign sovereign can issue, or is allowable. In that case *it really is not process against the foreign sovereign, but it is a mere matter of course,* for the defendant there is, in fact, merely giving to the foreign sovereign's attorney or solicitor notice of the proceedings—for that is, in substance, what it comes to—*so as to bring in whatever defence there might be,* or whatever counter-claim there might be, as a set-off."[1]

Manifestly the defense of the statute of limitations is comprised within this language. The exemption of the local sovereign from such defense is not an indication to the contrary. It is obvious, for instance, that in equity the claim of a foreign sovereign (whether maintained by itself or by an assignee) would be subject to the usual rules of estoppel. Even the local sovereign has on occasion (pp. 37-8 above) been held subject to estoppel. Yet more frequently he has been protected against estoppel by the rule *nullum tempus.* See *Candler* v. *Lunsford,* 20 N. Car. 407, 408 (1839); *People* v. *Brown,* 67 Ill. 435, 438 (1873); *The Queen* v. *Black,* 6 Can. Exch. 236, 253 (1899); *Humphrey* v. *The Queen,* 2 Can Exch. 386, 390 (1891). These courts put the doctrine of exemption of the local sovereign from estoppel upon the same basis as its exemption from limitations. Thus the Illinois court says:

> "As between the government and an individual, we have found no case holding the former would be estopped by any statement of its officials from recovering its own.
>
> "It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public

[1] Italics supplied.

> policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine."

While this result may be consecrated by the maxim *nullum tempus occurrit regi* as concerns the local sovereign, it could not for a moment be permitted for a foreign sovereign plaintiff within the rules elsewhere stated by the Circuit Court of Appeals of the Second Circuit itself:[1]

> "The Supreme Court has held, independently of any statute, that, where the sovereign brings a suit, it submits to the application of the same principles which govern private suitors. * * * Where a sovereign voluntarily litigates, he must play the role of a litigant like any other suitor and abide by the consequences. * * * When a sovereign sues, it may not expect a preferred status, for its suit is determined according to the rules applicable to private suitors in like cases."

If upon such principles a foreign sovereign plaintiff is subject to the law of estoppel, why is he not subject to the analogous principles of laches, limitation, and prescription, notwithstanding the usual exemption of the local sovereign in that regard? In the obligation to "comply with our substantive law and our procedure",[2] must not the plaintiff state accept the statute of limitations as part of the common fare of the court? We answer that the foreign plaintiff is assuredly bound to do so, for the reason that the principle of limitations and prescription as fixed in the procedure of the forum has long been recognized to be essential in the administration of justice.

---

[1] *United States* v. *National City Bank*, 83 F. (2d) 236, 238, 239 (C. C. A. 2, 1936) cert. den. 299 U. S. 563.

[2] Mayer, D. J., in *The Jane Palmer*, 270 F. 609, 612 (S. D. N. Y. 1920).

E. The statute of limitations has long been recognized as a meritorious defense essential in the administration of justice.

The policy of limitations and prescription is one of the oldest in the law. Acquisitive prescription and the limitation of actions were both known in Roman law.[1] The New York statute is strictly one of limitations, abrogating the remedy without impairing the right.[2] It was first enacted in 1788, the provision in the present Civil Practice Act dating back to the original Code of 1848.[3] The comparable English statute was the Limitation Act, 1623, 21 Jac. 1, c. 16. This was, of course, the law of New York during the Colonial period.

In *Green* v. *Rivett*, 2 Salk. 421 (1702) the Court of King's Bench said:

> "* * * the statute of limitations, on which the security of all men depends, is to be favoured."

This has been the view of the New York courts. In *Brooklyn Bank* v. *Barnaby*, 197 N. Y. 210, 227 (1910) the Court said:

> "At common law a right of action which had once accrued was immortal. Experience long ago demonstrated the unwisdom of such a rule. Practical considerations applied to the administration of justice demanded that legal disputes should be settled while evidence was readily obtainable."

---

[1] Gaius, Institutes, Book ii Section 61 (usucapio), Book iv Section 110 (limitations), about A. D. 150; Justinian, Institutes, Book II Tit. vi, Book IV Tit. xii, about A. D. 533.

[2] *Lightfoot* v. *Davis*, 198 N. Y. 261, 264 (1910).

[3] Act of February 26, 1788, Section X, Laws of New York, 11th Session, Cap. XLIII; Code of 1848, §91, Laws of New York 1848, 71st Session, Chap. 379.

In *Schmidt* v. *Merchants Despatch Transportation Co.*, 270 N. Y. 287, 302 (1936) Lehman J. pointed out:

> "The statute of limitations is a statute of repose. At times, it may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims."

This Court recognizes the defense of limitations to be one resting upon sound policy and tending to the peace and welfare of society. *M'Cluny* v. *Silliman*, 3 Pet. 270, 278 (1830). In holding an action barred under the law of Kentucky as against a claim of revival by acknowledgment, Mr. Justice Story said in *Bell* v. *Morrison*, 1 Pet. 351, 360 (1828):

> "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them."

This view of the policy of limitations and prescription has been constantly reiterated in this Court. In *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895), the Court said in sustaining the statute of limitations of Massachusetts to an action at law for the infringement of a patent:

> "Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired."

In *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, (1922), this Court on an extensive review of the authorities held that the defense of limitations is not a technical defense but substantial and meritorious, quoting in particular *Wood* v. *Carpenter*, 101 U. S. 135, 139 (1879) and *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall. 386, 390 (1868).[1]

For this reason this Court has in a series of cases affecting boundaries between states of the Union applied the principles of prescription even in the absence of positive statutory direction. See

> *Rhode Island* v. *Massachusetts*, 4 How. 591, 639 (1846);
> *Indiana* v. *Kentucky*, 136 U. S. 479, 510 (1890);
> *Louisiana* v. *Mississippi*, 202 U. S. 1, 53 (1906);
> *Maryland* v. *West Virginia*, 217 U. S. 1, 42 (1910);
> *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926).

In these cases, of course, the lapse of time was much greater than that prescribed in the ordinary municipal statute of limitations. Yet the principle invoked by this Court is the same. In *Rhode Island* v. *Massachusetts* Mr. Justice M'Lean said:

---

[1] See to the same effect Wood on Limitation of Actions (4th Ed. 1916) §4; Borchard Diplomatic Protection of Citizens Abroad §384; 3 Wharton International Law Digest (2nd Ed.) 972 §239 Appendix.

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

While it is true that the states of the Union are not nations either as among themselves or as against foreign nations,[1] nevertheless the principles involved in the application by this Court of acquisitive prescription to suits between them are true principles of international law. As was pointed out in *Michigan* v. *Wisconsin*, 270 U. S. at 308, prescription runs against a full sovereign. And this principle has been fully recognized by international tribunals generally, applying the considerations stated by this Court in the boundary cases. Illustrations are the opinion of the Greco-Bulgarian Mixed Arbitral Tribunal in *Sarropoulos* v. *Etat bulgare* (1927), 7 Recueil T. A. M. 47, 51; the language of the United States-Venezuela Arbitration Commission in the *Spader* case (1903), Ven. Arb. of 1903, 161, Ralston, Law and Procedure of International Tribunals (1926) p. 378; the language of the same Commission in the *Gentini* case, Ven. Arb. of 1903, 720, Ralston, p. 378; the decision of the United States-Venezuela Commission of 1885 in the *Cadiz* case, 4 Moore Int. Arb. p. 4199; the decision of the same Commission in the *Williams* case, 4 Moore Int. Arb. p. 4181; and the decision of Sir Edward Thornton as Umpire of the Mexican-American Claims Commission of 1868 in the *Mossman* case, 4 Moore Int. Arb. p. 4180.

---

[1] *New Hampshire* v. *Louisiana*, 108 U. S. 76, 90 (1883).

Of these cases, perhaps the *Williams* case contains the most thorough consideration of the principle of prescription of international claims even between sovereign states and without express provision therefor in the procedural code of the forum. The Commission concluded that as a matter of principle the lapse of about twenty years should bar a claim in international law, and dismissed a claim presented on behalf of the United States against Venezuela twenty-six years after its accrual. In *Sarropoulos* v. *Etat bulgare*, the Greco-Bulgarian Mixed Arbitral Tribunal declared:

> "Prescription, an integral and necessary part of every system of law, is entitled to be received in international law."

The United States-Venezuela Commission of 1885 in the *Cadiz* case pointed out, in rejecting a stale claim (4 Moore Int. Arb. at p. 4203):

> "It is true that this Commission is an international tribunal and in some sense is not fettered by the narrow rules and strict procedures obtaining in municipal courts, but *there are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice.*"[1]

There are of course apparent exceptions to this general rule. Such are the two cases cited by Judge Manton in his concurring opinion.[2] In *Collac* v. *Yugoslav State*, Ann. Dig. 1929-30, 9 Recueil T. A. M. 195 (1929), the Yugoslav-Hunga-

---

[1] Italics supplied. See also the language of Professor Borchard, *The Diplomatic Protection of Citizens Abroad* (1922) page 826; Rules of Prescription adopted by Institute of International Law, Annuaire (1925) page 558, 18 A. J. I. L. 760; Ralston, *Law and Procedure of International Tribunals* (1926) Ch. 13.

[2] R. 291; 91 F. (2d) at 903.

rian Mixed Arbitral Tribunal held merely that the four-year statute of limitations in the municipal law of Yugoslavia did not apply to a proceeding under the Treaty of the Trianon in view of the fact that Article 239 of that Treaty authorized the tribunal to establish its own procedure and in view of the fact that, acting thereunder, the tribunal had allowed until December 31, 1925, for the filing of claims. The claim in question was filed on December 2, 1925. Obviously this decision has nothing to do with the principle under discussion. In the *George W. Cook* case, Ann. Dig. 1927-8, No. 174, Ralston, Supplement to the Law and Procedure of International Tribunals (1936), p. 185, the Mexican-American Claims Commission of 1927, said that there is no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal. The holding, however, was merely that the municipal statute of limitations of Mexico did not relieve it from liability to the United States in international law. The Commission forbore to lay down a general rule, saying:

> "It has sometimes been said that statutes of prescription are not a bar to international reclamations. General statements of this kind have perhaps at times led to some confusion of domestic law with a well recognized principle of international practice."

H. Lauterpacht remarks in *Private Law Sources and Analogies of International Law* (1927), pages 118-9:

> "While the field of application of acquisitive prescription is naturally a limited one, extinctive prescription, corresponding to limitation of actions in municipal law, is becoming of ever-growing importance in international arbitration. * * * Where international tribunals refuse to recognize the plea of prescription, the refusal can, as a rule, be traced to the special circumstances of the particular case."

Because in the nature of things international tribunals are subject to no *legislative* direction as to a period of limitations or prescription, and because the submission to international arbitration never provides for a bar on account of the lapse of time but has in fact been construed to waive prescription,[1] the continuous trend of authority even in those tribunals to the effect that claims of a sovereign state must be barred on account of staleness is a cogent indication of the wisdom and justice of the principle of limitations involved in this action.

F. Allowance of the Defense of Limitations against a Foreign Sovereign's Claim is no Impairment of its Immunity as Heretofore Understood.

The decision of the Circuit Court of Appeals seems to have been placed upon three grounds. One was the erroneous interpretation already discussed (pp. 28-32 above) of the phrase "applicable to all governments alike". The second was that Court's understanding of *U. S.* v. *Belmont*, 301 U. S. 324, discussed below at pages 83-7. The third was the concept of sovereign immunity. Judge Swan thought that to refuse to apply the rule *nullum tempus* to a foreign sovereign would be to accord to it less than full sovereign rights (R. 284, 91 F. [2d] at 900). Judge Manton based his whole opinion upon the principle of sovereign immunity enunciated in *The Schooner Exchange* v. *M'Faddon* (1812) 7 Cranch 116 and *The Parlement Belge* (1880) L. R. 5 P. D. 197.

[1] Thus in *The Pious Fund of the Californias*, For. Rel. 1902, App. II, page 63, the brief of the United States argued that Mexico's execution of the submission to arbitration was a waiver of the defense of limitations; and the tribunal in effect so held (Ibid. p. 17).

It seems to us that the irrelevance of the concept of sovereign immunity to the point here under discussion is easily demonstrated.

1. As has already been shown (pp. 35-43 above), the foreign sovereign's claim, when submitted to a municipal forum, must take the common fare of the Court and must be subjected to all the principles of law requisite to do justice between private citizens. The principle involved is one of waiver of the sovereign's immunity. See, for example, *United States* v. *The Thekla*, quoted at page 36 above.

Judge Manton's opinion does not deal at all with the possibility of waiver. Judge Swan, however, says that the submission of the foreign sovereign is a matter pertaining to procedure after the sovereign has sought the aid of the court, while the effort here is to charge the sovereign with the responsibility for something which occurred before he sought the aid of the court (R. 284, 91 F. [2d] at 900).

The distinction suggested is, we submit with respect, an impossible one and wholly inconsistent with the principle of waiver by submission to the jurisdiction. It would apply as well to the defense of contributory negligence or to a cross-claim for damages, both of which relate to matters occurring before the sovereign invoked the aid of the local court, yet matters in respect of which it is held that the sovereign must submit to adjudication in connection with his own claim.[1] On the other hand, allowance of the defense of limitations is, even more peculiarly than set-off or counterclaim or the defense of contributory negligence, a matter

[1] *United States* v. *Moscow-Idaho Seed Co.*, 92 F. (2d) 170 (C. C. A. 9, 1937); *United States* v. *The Thekla*, 266 U. S. 328 (1924); *The Newbattle* (1885) L. R. 10 P. D. 33.

pertaining to procedure after the sovereign has sought the aid of the court.[1] The New York statute of limitations is found in the State code of procedure. It is well understood that this statute operates upon the remedy only, not upon the right.[2] To grant judgment against the foreign sovereign's claim on the ground of the statute of limitations of the forum is therefore precisely to subject the foreign sovereign to the procedure of the forum after he[3] has invoked its aid and to apply to him upon the same footing as any private litigant the rules determined, and rightly determined, by the forum to be essential in the administration of justice. The bar of limitations is that very practice of the court, which Lord Brougham said was part of the law of the court. *King of Spain* v. *Hullett*, 7 Bligh N. S. 359, 393, quoted at pages 41-2 above. When by the institution of an action thereon the claim of the foreign sovereign is submitted to a municipal court, the waiver of the sovereign's immunity with respect to all matters connected with that cause of action, at whatever time occurring, is complete. To whatever defense any of those matters might give rise as against a private litigant, to that defense the defendant is entitled against the foreign sovereign's claim.

---

[1] Judge Swan's opinion justifies the allowance of set-off or counterclaim against a foreign sovereign as was done in *United States* v. *National City Bank*, 83 F. (2d) 236, certiorari denied 299 U. S. 563, on the ground that "that is a matter pertaining to procedure after the sovereign has sought the aid of the court". R. 284; 91 F. (2d) at 900.

[2] *Lightfoot* v. *Davis*, 198 N. Y. 261, 264 (1910); *Campbell* v. *Holt*, 115 U. S. 620, 626 (1885); *Campbell* v. *Haverhill*, 155 U. S. 610, 618 (1894).

[3] Or (as in this case) the assignee of the foreign sovereign. The assignee can stand in no better place than the foreign sovereign itself, as the Circuit Court of Appeals recognized in the case of another claim assigned by the State of Russia. *United States* v. *National City Bank*, 83 F. (2d) 236, 239, certiorari denied 299 U. S. 563. See also *United States* v. *President etc. of the Manhattan Co.*, 276 N. Y. 396, 406-7 (1938); *U. S. Belmont*, 301 U. S. 324, 335 (1937).

2. The application of limitations to the foreign sovereign's claim does not go so far as some of the consequences of his submission to the jurisdiction which are firmly established. The allowance of a set-off or counterclaim, for example, not only takes the sovereign's property but may result in an affirmative judgment against him.[1] The statute of limitations technically takes no property. It affects the remedy only.[2] Hence, as a formal matter, the foreign sovereign is not by a successful plea of limitations injured in his property at all, but is merely deprived of a remedy of the municipal courts which had theretofore been open to him and which is withdrawn after the lapse of the statutory period because of the inequitable burden placed upon the defendant by his delay. The liberty to avail of that remedy is not in itself a property right or title in the foreign sovereign. The right of action of a foreign sovereign has been described by this Court as a privilege based on comity and friendly feeling (*The Sapphire* [1870] 11 Wall. 164, 167) and with respect to it the New York Court has said:

> "It may, however, not be demanded as a right. It is yielded as a favor. * * * We reach the conclusion, therefore, that a foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity."
>
> *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255, 259, 262 (1923).

---

[1] *U. S.* v. *The Thekla*, 266 U. S. 328 (1924); *U. S.* v. *Paquete Habana*, 189 U. S. 453, 465 (1903); *U. S.* v. *The Nuestra Señora de Regla*, 108 U. S. 92, 102 (1882).

[2] See cases cited at note 2 on page 58 above.

The fact that, as is pointed out by Judge Manton,[1] the foreign sovereign cannot be compelled to sue, any more than he can be compelled to submit to suit, is in our respectful submission wholly immaterial. It is quite wrong, in our submission, to argue that, because there is no law requiring the ambassador to sue, the statute of limitations cannot be invoked against him. There is no necessary connection at all between these propositions. Even a private litigant cannot be compelled to sue, though he may be subjected to suit. The running of the statute of limitations against the claim of a private litigant is predicated, not upon any right of compulsion with respect to him, but upon *the accrual of a cause of action.* New York Civil Practice Act §48, page 92 below. The cause of action of a foreign sovereign accrues in the same manner and upon the same facts as any other cause of action. There is no mystical quality in the immunity of the sovereign which differentiates his cause of action in respect of accrual. Under the New York statute, it accrued either upon demand or (in the absence of demand) then upon notice to him of the debtor's repudiation of liability.

The Circuit Court of Appeals for the Second Circuit itself took, in 1927, the position taken in this brief with respect to Mr. Ughet's duty to sue. In *Lehigh Valley R. Co.* v. *State of Russia,* 21 F. (2d) 396, 400, certiorari denied 275 U. S. 571, Judge Manton said with respect to Mr. Ughet's continuation of the actions instituted against Lehigh Valley Railway Company by Mr. Bakhmeteff as Ambassador in 1918:

> "This duty became obvious. It became important to avoid efforts to destroy the right of action as a basis

[1] R. 290, 91 F. (2d) at 903, citing *Musurus Bey* v. *Gadban* [1894] 2 Q. B. 352. This case held merely that, since a foreign ambassador is immune from suit, the statute of limitations does not run *in his favor* and against his creditors during the period of immunity.

> of keeping its property, when motions to dismiss were made and *delays occurred which would give rise to the bar of limitation to sue.*"[1]

In the instant case the facts which gave rise to a cause of action occurred in 1918-20. The New York statute says:

> "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete, except in one of the following cases * * *"[2]

The exception was negatived by petitioner's repudiation. In the *Tillman* case the New York Court of Appeals said (253 N. Y. at 297):

> "By failure to make a demand which is unnecessary, a depositor cannot prevent the period of limitation from running against a cause of action which he is entitled to maintain without demand."

There is nothing in the position of a foreign sovereign in this country which entitles him to carry on commercial dealings with American nationals free of such requirements as these. The opinions of the Circuit Court of Appeals confer upon the foreign sovereign with respect to his transactions here a new status of untouchability. Mention is made of his extra-territorial privileges with respect to property (R. 289, 91 F. [2d] at 902), as if the debt of the New York bank to him enjoyed extra-territoriality. Mention is made of diplomatic means as the only recourse available to the claimant against a foreign sovereign (R. 288, 91 F. [2d] at 902). Similar considerations were indulged by the same court in

---

[1] Italics supplied. The bar of limitations so referred to was a two-year restriction incorporated in the bills of lading. *Russian Government* v. *Lehigh Valley R. Co.*, 293 F. 133 (D. C. S. D. N. Y. 1919).

[2] Civil Practice Act §15, page 92 below.

The Navemar, 90 F. (2d) 673, where Judge Manton's opinion held that the suggestions of the Spanish Ambassador as to his Government's title to the ship must be accepted as conclusive, and that they could be examined, if mistaken, only through diplomatic channels. This decision was reversed by this Court on January 31, 1938.[1] This Court held that the suggestion of the Spanish Ambassador was not conclusive, and that the jurisdiction of the admiralty court over the ship was a proper subject for inquiry upon proof of the matters alleged.

The principle applicable here, with reference to the claim of the foreign sovereign as brought into court by its assignee, is that stated by Judge Mack in *The Gloria*, 286 F. 188, 193 (D. C. S. D. N. Y. 1923)[2] and by this Court in *U. S.* v. *The Thekla*, 266 U. S. 328 (quoted at p. 36 above), and that expressed by A. S. de Bustamante[3] in his *Derecho Internacional Privado* (Havana 1931) Vol. 3, §1671:

> "The principle [of sovereign immunity] is incompetence, only modified when the foreign State, submits voluntarily to local justice, or when it acts in form and with a private character thereby divesting itself of its privileges and prerogatives. * * * In other words, when the foreign State may be judged by us, the fundamental rules of our jurisdiction in civil and mercantile causes are not altered thereby. These rules are maintained intact, merely permitting that said State may be, within them, one of the litigants."

---

[1] *Compania Española de Navegacion Maritima S. A.* v. *SS. Navemar*, No. 242, not yet officially reported.

[2] Judge Mack said at page 194:

> "There is no principle of public law exempting a sovereign state from its obligations under the law. * * * But, once the state has chosen its forum, there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice."

[3] Judge of the Permanent Court of International Justice and author of the Pan-American Code of Private International Law (p. 99 below).

The immunity of the public property of a foreign sovereign from the compulsion of judicial process, as delimited in *The Schooner Exchange* v. *M'Faddon* (1812) 7 Cranch 116, and *The Parlement Belge*, L. R. 5 P. D. 197 (1880), is not here involved at all. That immunity is constructed on the theory of an implied consent by the local sovereign "to waive its jurisdiction", founded upon its exclusive control of its own territory, over the property of a foreign sovereign here under license.[1] The running of the statute of limitations against a foreign sovereign's claim when submitted to the municipal courts is, however, predicated upon the reverse theory of *waiver of its immunity*. It is clear that the two theories are not in conflict and that the decision below can be regarded only as an unwarranted extension of the existing concept of sovereign immunity.[2]

3. Judge Swan stated that to refuse a foreign sovereign the benefit of the rule *nullum tempus* would be to accord to it "less than full sovereign rights" (R. 284, 91 F. [2d] at 900). It already appears, in the light of the requirement of submission by the foreign sovereign to the rules of the forum (pp. 35-44 above), that the application to his case of a statutory rule of limitations does not diminish the immunity to which he is entitled. But in any event it is untrue to say that a foreign sovereign is entitled, upon the territory of the local sovereign, to "full sovereign rights". The penal and revenue laws of a foreign sovereign, for example, will not be enforced here.[3] A foreign sovereign,

---

[1] Marshall, C. J., 7 Cranch at page 146.

[2] See note in Yale Law Journal November 1937, Vol. 47 at page 135: "The rule in the instant case extends sovereign immunities into a field where they serve no useful purpose but defeat an underlying policy of another sovereign government."

[3] *State of Wisconsin* v. *Pelican Insurance Co.* (1888), 127 U. S. 265; *The Antelope* (1825), 10 Wheat. 66; *Queen of Holland* v. *Drukker* [1928] Ch. 877.

of course, cannot levy troops or exercise eminent domain here. The foreign sovereign may be compelled to give security for damages on a counterclaim (p. 42 above), while the local sovereign may not. The foreign sovereign may be compelled to answer under oath, while the local sovereign may not (p. 41 above). The foreign sovereign must pay costs, while the local sovereign is exempt from that necessity (pp. 40-1 above). The local sovereign by virtue of his prerogative has priority over all citizens for the payment of debts due it out of a debtor's property[1], while we should not suppose it would be urged that the State of Russia was entitled to this privilege.

All of the powers and privileges enumerated are of the essence of "full sovereign rights" and inhere in the local sovereign by virtue of his prerogative just as does the right to exemption from limitations. Yet it has never heretofore been held that the foreign sovereign is impaired in his immunities or deprived of the comity due him because he is not admitted to the enjoyment of like powers and privileges.

A foreign sovereign appears here in his private, not his sovereign, capacity. In *Georgia* v. *Chattanooga* (1924), 264 U. S. 472, this Court held that the acquisition by the State of Georgia of land for railway purposes in the State of Tennessee, with the consent of the latter, did not subtract from the sovereign power of Tennessee or of the City of Chattanooga as its grantee to take that land by eminent domain for highway purposes. This Court said (p. 480):

> "Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning State does not restrict or modify the power of

[1] *Marshall* v. *New York*, 254 U. S. 380, 382 (1920); *U. S.* v. *State Bank of North Carolina*, 6 Pet. 29, 34 (1832).

eminent domain of the State wherein the land is situated. See *Burbank* v. *Fay*, 65 N. Y. 57, 62; *United States* v. *Railroad Bridge Co.*, 6 McLean 517, 533; *United States* v. *Chicago*, 7 How. 185, 194. Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister*, 2 Pet. 318, 323; *Louisville, C. & C. R. R. Co.* v. *Letson*, 2 How. 497, 550; *South Carolina* v. *United States*, 199 U. S. 437, 463. Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia."

So Lord Brougham said in *King of Spain* v. *Hullett* (1833), 7 Bligh N. S. 359, 393:

> "The King of Spain sues here by his title of sovereign, and so he must be sued, if at all. But, beyond the mere name of sovereign, it has no effect. He brings with him no privileges which exempt him from the common fare of other suitors."

Similarly Lord Justice Blackburn indicated that the foreign sovereign plaintiff should, so far as possible, be put in the same position as a body corporate, and the New York court treated the foreign sovereign plaintiff as a "person" residing outside the jurisdiction.[1]

---

[1] *Republic of Costa Rica* v. *Erlanger* (1875), 1 Ch. D. 171, 174; *Republic of Honduras* v. *Soto*, 112 N. Y. 310 (1889). In *Republic of Peru* v. *Weguelin* (1875) L. R. 20 Eq. 140, 141-2, the Vice-Chancellor said:

> "The case of a foreign government is the same as that of a corporation, and the ordinary practice applicable to a corporation must be adapted, as well as it will admit, to the case of a foreign government, whether it be a republic or a sovereignty."

In *Prioleau* v. *U. S.* (1866) L. R. 2 Eq. 659, 663, the Vice-Chancellor said with respect to a foreign sovereign plaintiff:

> "Where the suitor is an individual, although he may be the sovereign of a foreign country and may of himself in reality represent the whole country of which he is sovereign, this Court has refused to acknowledge him when he comes here as a suitor in any other capacity than as a private individual."

That case was a cross-bill to a suit brought by the United States to recover proceeds of cotton consigned to the defendants by the Confederate Government. Adverting to the fact that the United States was a corporate sovereign not represented in court by any individual amenable to discovery, the Vice-Chancellor continued (p. 665):

> "Is there any reason why the Defendant in the original suit should be deprived of those privileges which are enjoyed by every other party to a suit, or why either he or the government suing here should not be dealt with according to the rules by which all other individuals, including the sovereign of any other state, must be dealt with when they seek to obtain relief in this Court? It appears to me there is no sound ground for saying that the rule is not to be applied."

These decisions make plain the fallacy involved in the Circuit Court of Appeals' use of "full sovereign rights" as a criterion for the application of the statute of limitations to the State of Russia in this forum. No foreign sovereign has the same measure of rights in the territory of the local sovereign as does the local sovereign. The reason is apparent from Mr. Justice Holmes' explanation of sovereign immunity in *Kawananakoa* v. *Polyblank* (1907), 205 U. S. 349, 353:

> "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without

its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. *'Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.'* Bodin, Republique, 1 c. 8, Ed. 1629, p. 132. Sir John Eliot, De Jure Maiestatis, chap. 3. *Nemo suo statuto ligatur necessitative.*[1] Baldus, De Leg. et Const., Digna Vox (2 ed., 1496, fol. 51b Ed. 1539, fol. 61)."

It is to be remembered that the doctrine of immunity, so far as concerns the property of a foreign power, is of fairly recent development in our law. In the middle ages jurisdiction was asserted of foreign sovereigns in the courts of their feudal overlords.[2] As late as 1818 Sir John Leach V.-C. ordered the King of Spain to be named as a party to an action in the Chancery Court in order to charge his agent, holding distinctly that a foreign government or sovereign could be sued in England.[3] The earliest case in which the immunity of the public property of a foreign sovereign seems to have been accepted in the court of any English-speaking country

---

[1] "Of necessity no person is bound by his own enactment." While this is true as a logical proposition, it is not the theory of the civil law, as is shown by the cases subjecting the domestic sovereign in European and Latin-American countries to the statute of limitations. Appendix II, page 96 below. This theory derives from the rescripts of the Roman Emperors Severus and Antoninus quoted by Justinian, Institutes, Book II tit. 17: "For, though the laws do not bind us, yet we live in obedience to them." This, we again point out, is the theory of the New York statute of limitations. Civil Practice Act §54, at page 93 below.

[2] E.g. the proceedings of Edward I of England against John Baliol, King of Scotland. Ryley, Placata Parliamentaria, page 143. As late as 1777 the Advocate-General Seguier argued in the French Court of Requests: "Pourquoi donc un souverain serait-il exempt? Il n'est souverain que dans ses états." *Hôtel du Souverain*, Requêtes [1777].

[3] *De la Torre* v. *Bernales*, 1 Ves. Jr. Hov. Supp. 149.

is *Moitez* v. *The South Carolina*, Fed. Cas. No. 9697 (Admiralty Pa. 1781), where no opinion was written. And the doctrine was not formulated in the United States courts until 1812 (*The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116), nor in the English courts until 1843 (*Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1). Nothing in the doctrine of immunity as so far developed requires the exemption of the foreign sovereign from the statute of limitations.

It has been well said by a writer on the subject:

> "The foreign sovereign is immune from suit in the courts of another country, not because of any right in the sense of historical or analytical jurisprudence, but solely because by the process of judicial self-limitation in the interest of friendly intercourse among nations we judge it inexpedient to issue process of any sort or to sit in judgment."[1]

This consideration of inexpediency, together with Mr. Justice Holmes' consideration of lack of power, quite disappears when the claim of the foreign sovereign is submitted to the judgment of a municipal court which has the statute of limitations incorporated in its procedure and imposed by the policy of its own sovereign. The rights of the foreign sovereign which are involved in this case and which were assigned to the United States, arose under the municipal law of this country. The bank deposit belonging to the State of Russia existed in the ordinary commercial relation of debtor and creditor usual between banks and depositors. *Kingdom of Roumania* v. *Guaranty Trust Company*, 250 Fed. 341, 345 (C. C. A. 2, 1918), certiorari denied 246 U. S. 663. The

[1] Ernest Angell "Sovereign Immunity", 35 Yale Law Journal 150, 152 (1925).

Permanent Court of International Justice has pointed out with reference to the contracts of sovereigns:

> "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[1]

In this instance the deposit of the foreign sovereign with the New York bank was unquestionably based on and subject to the municipal law of the State of New York. *Security Savings Bank* v. *State of California* (1923) 263 U. S. 282, 287-8. An essential part of the law of the deposit contract was the restriction upon the period during which it could be enforced. In his work *Actas y Tratados celebrados por el Congreso Internacional Sud-Americano de Montevideo* (Montevideo, 1911), Dr. Manuel Quintana, a Delegate for the Argentine to the Congress of 1888-9 which drew up the Montevideo Treaties on International Civil Law and Procedural Law,[2] clearly points out this conclusion. He says at pages 499-500:

> "What is, then, the law which should rule prescription under its double phase, extinctive and acquisitive? In the judgment of the majority of the Committee, the reply can be made in a general rule, to wit, that prescription is governed by the law which governs the juridic matter whose prescription is dealt with. Thus, prescription extinguishing personal actions is subordinated to the law of the place of their performance, that of real actions to the law of the situs of the properties encumbered, whether real or personal, and acquisitive prescription of corporeal things to the law of their situs, whatever their nature may be, in accordance with what

[1] *Government of the French Republic* v. *Government of the Kingdom of the Serbs, Croats and Slovenes*, Judgment No. 14, July 12, 1929, 2 Hudson World Court Reports 344, 371.

[2] See at page 96 below.

is enacted under the titles relative to properties and juridic acts.

* * * * * * *

Under its extinctive phase, prescription is in effect nothing more than a means of enervating actions directed to the enforcement of pending obligations. As the resultant of the right of the creditor to force the debtor to carry out his agreed undertaking is a juridic obligation, the action is bound intimately to the obligation, and should be governed by the same law. When two persons contract, they agree, tacitly but clearly, that the period within which the one may proceed against the other, in order to hold him to the performance of his obligation, depends on the law under whose jurisdiction the action arose.

This solution, as Savigny points out, is that most in accord with principles and equity. With principles, because fixing in a definite manner the law on prescription, it prevents one of the parties from instituting anything in prejudice of the other. With equity, because, not only is it illicit for the creditor to select for the exercise of his action the place where prescription lasts longer, but also the debtor is not permitted to choose through a change of domicile the place where prescription lasts less long. * * *"

In the instant case, nothing in the history of sovereign immunity, nothing in the history of the rule *nullum tempus*, no precedent and no policy justifies the exemption of the foreign sovereign's claim to the bank deposit from the statute of limitations of New York as part of the procedure of the forum which its assignee has invoked. All the foreign sovereign or its assignee can reasonably ask is the same opportunity to sue as residents of the forum have. As Mr. Justice Story said in *LeRoy* v. *Crowninshield*, 15 Fed. Cas. No. 8269, at page 365 (C. C. Massachusetts 1820):

"Courts of law are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and

fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order, from mere comity to any foreign nation. It is sufficient, if it gives to foreigners the same means to enforce their rights, as it does to its own citizens."

G. Prejudice to the petitioner from the lapse of time is apparent upon this record.

The present record illustrates the necessity for the application of the statute of limitations in actions by foreign states. The Soviet Revolution occurred on November 7, 1917, and the decree nationalizing the Russian banks who were debtors of the petitioner was enacted December 27, 1917 (R. 81). The petitioner's set-off whereby it absorbed the account in suit in payment of its claims against the State of Russia occurred February 25, 1918 (R. 82), and in it the ruble accounts owed to the petitioner were taken at their book value as of that time (R. 82). The present action was not commenced until September 21, 1934 (R. 1). The claim came into the hands of the plaintiff by assignment from the State of Russia on November 16, 1933 (R. 3), about sixteen years after the events which gave rise to the petitioner's set-off.

In this interval of sixteen years witnesses who would have been available for the petitioner for the trial of the action have died. Charles H. Sabin, President of the petitioner at the time of the transactions in question, died on October 10, 1933 (R. 83). Albert Breton, Vice-President in charge of the petitioner's Foreign Department at the time of the transactions in question (R. 223-4), died on December 22, 1936.[1] Grayson M-P Murphy, a director of the petitioner during

[1] New York Times December 23, 1936, page 17.

the time of the transactions in question and previously a Vice-President (R. 95, 235), died on October 18, 1937.[1] For the proof of the indebtedness owing to the petitioner by the State of Russia as assignee of the various Russian banks, debtors of the petitioner, which it nationalized, the petitioner might reasonably demand recourse to the books of account of those banks as containing the primary entries, and the opportunity to identify such books of account through witnesses familiar with them. The petitioner will be expected to prove the exchange value of the ruble at the time of the nationalization through the testimony of witnesses who have personal knowledge of ruble-dollar exchange transactions in December, 1917 and January, 1918. The Court will take judicial notice of the fact that since November, 1917, the State of Russia has been subject at intervals to revolution, civil wars, and great internal disturbance. The Russian banks which had original custody of the books of account have, of course, been nationalized. Their officers and employes have died, been exiled, or disappeared. Their books, if they have not been destroyed or lost beyond trace during the various commotions, have passed into the custody of various departments of the Soviet Government which has assigned to the United States the claim in suit.

Under these circumstances, it is probable that much evidence has been lost by the death or disappearance of witnesses and the destruction of records, and that petitioner will find it much more difficult at the present time to prove its set-off to the assigned claim than it would have been if suit had been brought within the period fixed by the statute of limitations.

---

[1] New York Times October 19, 1937, page 25.

Existence of recognized representatives of State of Russia authorized to bring suit.

Yet it is clear that the Ambassador and the Financial Attaché recognized by the political department of our Government as speaking for the Government of the State of Russia, could at all times in and after 1918 have brought suit for the account here involved. So much has been expressly decided. *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) 396, certiorari denied 275 U. S. 571; *State of Russia* v. *Bankers Trust Co.*, 4 F. Supp. 417, 419, affirmed 83 F. (2d) 236 certiorari denied 299 U. S. 563; *Russian Government* v. *Lehigh Valley R. Co.*, 293 F. 133, 135 (D. C. S. D. N. Y. 1919). They made numerous attempts to obtain it without suit. Their counsel in conference with petitioner's counsel on June 26, 1919, stated exactly the theory upon which the Ambassador could sue for the account (R. 84, 113). The evidence and the findings of the District Court overwhelmingly show that the failure to bring suit was preceded by clear notice of petitioner's set-off and counterclaim (pp. 8-9) above. The Government of the State of Russia deliberately elected not to sue during the statutory period, although the petitioner again and again brought home to that Government its own claim to the money. The Financial Attaché wrote his counsel on July 14, 1919 (R. 146):

> "It is utterly useless to raise this subject with Mr. F. Polk [then Under-Secretary of State], as the result of all conversations with him always pointed toward an appeal to the Supreme Court which in my mind is to be avoided at all for the time being."

Thus it is plain that, if the innovation in the law which the decision below represents is to stand, this petitioner will

be prejudiced in its defense by the wilful and unexcused delay of action by the sovereign whose claim is now put in suit by the United States. The result will be not only injustice to the petitioner, but a precedent of unfortunate consequence to all American citizens who have commercial relations with foreign states. In an era when more and more foreign states are gathering into their hands the conduct of affairs formerly left to individuals, such a precedent is indeed disastrous. The decision of the Circuit Court of Appeals exposes to question and judicial inquiry the business dealings of American nationals with foreign powers over the entire period of the history of this country; since on the theory enunciated by that Court, no statute of limitations has run against any foreign government in any forum of this country from 1776 to the present day.

In so doing the decision below comes into conflict with what this Court and every other court has recognized to be a high public policy of the forum, namely to require the litigation of claims while the evidence is fresh. The exception to that policy running in favor of the local sovereign in the form of the rule *nullum tempus,* is dictated by another public policy of preserving the property of the people from the consequences of negligence of their officers. As this Court remarked in *United States* v. *Verdier,* 164 U. S. 213, 218 (1896),

> "The truth is that in its dealings with individuals public policy demands that the government should occupy an apparently favored position."

This exemption, as has been shown, is limited by the policy which gives it rise to the Government of the forum. Yet, so strong is the countervailing policy embodied in the principle of limitations that the local sovereign has been sub-

jected to it both by the course of judicial decision (pp. 32-5, 37-8 above) and by his own self-denying ordinance. This is true no less of the Federal than of the State sovereignties. With exceptions for fraud and evasion, internal revenue taxes generally must be assessed within four years, and proceedings in court for collection thereof without assessment must be begun within five years.[1] With similar exceptions, estate taxes must be assessed or sued for within three years.[2] With similar exceptions income taxes must be assessed within three years and sued for within six years after assessment.[3] So with gift taxes.[4] The statute of limitations on distraints for estate and gift taxes assessed is six years.[5] Claims by the United States on judgments of the Court of Claims against officers or agents of the United States, their guarantors or sureties, are barred three years after judgment of the Court of Claims.[6] Suits to recover penalties or forfeitures under the customs laws must be commenced within five years after discovery.[7] The Revised Statutes are full of limitations imposed by Congress upon the paramount sovereign in the interest of the public policy represented by the principle of repose. This is the principle overturned to the prejudice of the United States and its citizens by the decision of the Circuit Court of Appeals in the instant case. It is submitted that the District Court was right in holding that the granting of this privilege to foreign states, who come within our territorial limits and carry on business transactions here, is monstrous as a matter of public policy (R. 271).

---

[1] 26 U. S. Code §1432.
[2] 26 U. S. Code §474.
[3] 26 U. S. Code §§275, 276.
[4] 26 U. S. Code §566.
[5] 26 U. S. Code, §§474, 566.
[6] 28 U. S. Code §287.
[7] 19 U. S. Code §1621.

This unwarranted extension of the theory of state immunity is particularly undesirable for the United States as a matter of policy, in view of the fact that it appears that the United States itself as a suitor in the courts of any other foreign country would not be accorded the same privilege of exemption from limitations. The foreign law authorities on this point are collected in Appendix II of this brief. While an existing rule of our law will not be modified against a foreign sovereign because it varies from his own law,[1] nevertheless the definite superiority of status which the decision below confers upon foreign sovereigns as suitors here by comparison with the status of the United States as a suitor elsewhere, is cogent reason against the establishment of an innovation in our law. The decision below, if affirmed, will give foreign sovereigns a degree of immunity and an advantage of delay against our citizens in our courts which in the reverse situation the courts of no foreign country would accord to the United States as a plaintiff there.

II.

When outlawed in the hands of the State of Russia, the claim here involved was not revived by assignment to the United States.

The District Court held that if the statute of limitations had run against the State of Russia as assignor prior to November 16, 1933, the date of the assignment, then by the assignment the United States as assignee took nothing

[1] *Berizzi Brothers* v. *The Pesaro*, 271 U. S. 562 (1926).

(R. 257). He regarded this point as one conceded by th United States, and in any event as entirely true. The opin ions of the Circuit Court of Appeals do not dissent from thi conclusion.

A. The claim barred in the hands of the assignor is barre in the hands of the assignee.

It is conceded, of course, that since the statute of limit tions does not bind the United States, the right of the Stat of Russia to the account in suit would still be open if th period of limitations had not been completed prior to N vember 16, 1933, the date of acquisition of the claim by th United States (R. 3). In view of the findings below, hov ever, to the effect that demand and refusal or their equiv lent occurred prior to June 30, 1922 (pp. 8-9 above), is clear that the six-year period of limitations was co pleted, and the defense perfected, long before November 1 1933. Under those circumstances, the acquisition of th claim by the local sovereign could not revive it or defe the bar.

This Court considered the point as beyond argument *U. S.* v. *Buford,* 3 Pet. 12 (1830). There the United Stat in 1823 took an assignment of a promissory note made 1812, and brought action thereon. The defendant plead the five-year statute of limitations of Kentucky. The demu rer of the United States to this plea having been overrule the decision was affirmed by this Court. At page 29 th Court said:

> "As more than five years had elapsed from the da of the receipt to the assignment, the statute of limi tions will bar a recovery of this claim, unless the tra fer of it to the United States has changed its charact

or the terms of the receipt prevent the statute from operating, or, by some promise or agreement between Morrison and Buford, the statute has been waived.

It can require no argument to show, that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor. If the character of the claim be so changed, as to exempt it from the operations of the statute of limitations, after the transfer, such transfer cannot have the effect to take the claim out of the statute when it has run."

This decision was cited with approval by this Court in *U. S.* v. *Nashville etc. R. Co.* (1885), 118 U. S. 120, 125, citing also *The King* v. *Morrall* (1818), 6 Price 24. In that case the Court of Exchequer sustained the plea of the statute of limitations against the Crown where the Crown's claim arose upon execution against a bill of exchange due by a person indebted to the Crown's debtor. The Court pointed out that in this case the claim of the Crown was only a derivative right, and it must therefore stand in the same situation as its principal. The Lord Chief Baron said (p. 28):

"I admit, that as between the Crown and its immediate debtor, this statute has no application. But in a case like this, where the question is what debt was due from the defendant to the Crown's debtor, the rule is very different; for the Crown is only entitled to its debtor's right, and cannot create or revive any right in the person of its debtor, if none ever existed, or it has become extinct. In this case, nothing could have been recovered by the debtor of the Crown against this defendant if the statute had been pleaded; I therefore consider that it is also a good bar to the suit of the Crown, who stands precisely in the same situation as its debtor, and that this is an honest plea, which therefore the law allows. If the Crown could thus put its debtor in a better situation than he was in before, by such a proceeding as this, the consequences would be monstrous before the passing of the late statute, and the mischief would have been incalculable."

Baron Garrow said (p. 30):

> "I am of the same opinion. Disposed, to the fullest extent, to protect the rights of the Crown, charged as it is with important trusts for the benefit of the community, of which it is the representative, I think that duty best performed by not carrying its claims beyond the line prescribed by justice: and I consider that the privilege now attempted to be established, would be both inconvenient and unjust. That debt was completely gone: then by a process, said, by a fiction, to be for the benefit of the Crown, it is attempted to revive the debt, and place the creditor in a better situation than the law permits. This is too gross an absurdity; and if we suppose the common case of one of the partners of a banking-house being a receiver-general, what extensive mischief might it not produce, when it is well known that the necessary acknowledgments are seldom interchanged on the settlement of banking accounts. It is right that the subject should take advantage of the principle of a statute, which, if it may in one or two cases through the laches of the party, have barred a just demand, yet has the constant effect of shutting out unjust claims founded on experiments made to take advantage of carelessness or misfortune on the chance of vouchers being lost or mislaid."

The principle that the United States as assignee stands in no better position than its assignor has been accepted by the courts in connection with the Litvinov assignment here involved. In *U. S.* v. *National City Bank,* 83 F. (2d) 236, certiorari denied 299 U. S. 563, the Circuit Court of Appeals for the Second Circuit held that the United States "having no more rights than its assignor", the State of Russia, was subject to set-off. See also *U. S.* v. *President and Directors of the Manhattan Company,* 276 N. Y. 396, 406-7 (1938) and *U. S.* v. *Belmont,* 301 U. S. 324, 335 (1937).

B. The defense of limitations, once perfected as against the State of Russia through its government then recognized by the United States, was not destroyed upon recognition of a new government through any doctrine of retroactivity or relation back.

The United States contended below that, even if the statute of limitations had run against the State of Russia by 1933, the resulting defense was in some way nullified by the recognition of the Soviet Government on November 16, 1933, since such recognition was retroactive to the inception of the Soviet Government on November 7, 1917. The District Court rejected this contention (R. 273). Judge Caffey said, in overruling it:

> "Even as to occurrences during the period when the Kerensky Government was recognized as the Russian State by the political branch of our Government, I am inclined to think that, under the authorities it has not been determined squarely yet that recognition of the Soviet Government carried back to the date of coming into being of the revolutionary government so recognized save as to acts done or property located within the territorial limits of the revolutionary government so recognized. I am inclined to think that, so far as concerns intra-Russia transactions, the doctrine of retroactivity applies. Whether or not, however, that has been authoritatively ruled, I am persuaded that it should be the law. On the other hand, in principle at least, as I read the decisions, it is established that recognition does not, under the doctrine of retroactivity, destroy a perfected or completed act or right which has occurred or come about within the territorial limits of the United States. This would seem to be particularly true as to such an act or right of an American in a transaction which he had had prior to that recognition. Otherwise put, I feel that, our Government having said to its own citizens that the Russian State was represented, and properly represented, by an Ambassador

> other than the one coming from the newly-recognized revolutionary government, I think the doctrine would be monstrous if, subsequent to reliance on the political branch of our Government having publicly assured the citizens of the United States that an individual whom our Government recognized as constituting, so far as we were concerned, the foreign state, the courts of the United States, dealing with what in the meantime had happened in this country, should take it upon themselves to say that, notwithstanding that recognition during that long period, so far as concerns what happened during that period, later recognition of a different revolutionary party in the foreign state would retroact in its effect to such an extent that it would destroy what had happened while citizens had acted on the faith of what their own government had done."

The Circuit Court of Appeals impliedly accepted the conclusion of the District Court on this point, in resting their reversal on the single proposition that the statute of limitations does not run against a foreign sovereign.

1. The doctrine of retroactivity or relation back is a doctrine of judicial development in the administration of justice, and is employed to accommodate the international status which a foreign regime acquires upon recognition by our political department, to the actual facts of its establishment. The effect of the principle is that, when a revolutionary movement in a foreign country has triumphed and transformed itself into a government recognized *de facto* or *de jure* by our Government, the acts of the new regime shall be given the force of law for our courts from the date of its inception. They are no longer to be regarded as the acts of *banditti* or mere mobs. *Underhill* v. *Hernandez* (1897) 168 U. S. 250, 253.

2. Hence, as Judge Caffey pointed out, the only operation of the doctrine of retroactivity has been to validate retrospectively the acts of the agents of the newly recognized foreign government *in its own country,* so as to save those acts from question in our courts. Such was the decision in *Underhill* v. *Hernandez* (1897) 168 U. S. 250, where the acts complained of were done by a military officer in Venezuela; in *Oetjen* v. *Central Leather Co.* (1918) 246 U. S. 297, where the question related to the seizure and sale of hides by General Villa in Mexico; in *Ricaud* v. *American Metal Company* (1918) 246 U. S. 304, where the transaction examined included acts of a Mexican commanding officer in seizing lead bullion in Mexico and selling it there; in *Luther* v. *Sagor & Co.* [1921] 3 K. B. 532, where the transaction complained of involved the seizure by the Soviet Government of a factory and a stock of wood in Russia; and in *Dougherty* v. *Equitable Life Assurance Society* (1934) 266 N. Y. 71, 84-5, where the act in question was that of the Soviet Government in cancelling Russian insurance policies expressly made subject by their terms to Russian law.

In none of these cases, and in no case so far as we have been able to find, has any court held that the effect of recognition of a new government is both to validate acts of the new government in its territory and *to invalidate acts of the predecessor government outside the territory of the state* done during the time when such predecessor government continued to be recognized by the political department of the forum. In fact, when the question was presented, in connection with litigation instituted by Mr. Bakhmeteff and Mr. Ughet on behalf of the State of Russia, whether the acts done by them and the judgments recovered by them would be invalidated retroactively by subsequent recognition of the

Soviet Government, the courts answered in the negative. *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) 396, certiorari denied 275 U. S. 571. Mr. Bakhmeteff on behalf of the State of Russia had brought suit against the Lehigh Valley Railroad Company on July 23, 1918, to recover for damage to the property of the Russian Government. 21 F. (2d) at 400. Defendant's motion to dismiss on the ground that there was in existence no Russian Government and therefore no plaintiff, was denied by the District Court upon the faith of the continued recognition extended by Mr. Bakhmeteff as Ambassador by the State Department. *Russian Government* v. *Lehigh Valley R. Co.* (1919) 293 F. 133. A renewed motion to dismiss was denied by Judge Mack on May 15, 1922 upon the authority of the prior decision of Judge Mayer. The case was then tried before Judge Goddard, who made an order changing the name of the plaintiff to the State of Russia and granted judgment for the plaintiff upon certain issues. 293 F. 135.

Thereupon and before trial of the remaining issues, the defendant Lehigh Valley Railroad Company made an application in this Court for an order of prohibition or mandamus prohibiting further proceedings in the action or for the dismissal thereof, upon the ground that Mr. Bakhmeteff was accredited by the Kerensky Government

> "which had been deposed and was without authority in or with respect to Russia";

and upon the ground

> "that no adjudication in the said action will protect the defendant, your petitioner, against claims which may hereafter be made in behalf of the State of Russia, if and when its present or any government of said State

shall be hereafter recognized as in friendly relations with the United States of America."[1]

This application was denied by this Court in 265 U. S. 573. The action then went to judgment, and upon appeal the defendant raised the same contention. In rejecting this contention the Circuit Court of Appeals, by Judge Manton, made the same distinction between intra-territorial and extra-territorial operation of retroactivity which the District Court has made in the instant case. Judge Manton said (21 F. [2d] at 401):

> "The argument that the plaintiff in error may at some future time, if the Soviet regime is recognized by our government, be compelled to pay again what it is obliged to pay now, is fallacious. It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition."

In opposition to the defendant's petition for certiorari, the State of Russia argued in this Court:

> "Obviously, future recognition of a new government in Russia could not affect acts fully consummated in America between American nationals and the representatives of Russia duly recognized by the Government of the United States."[2]

Certiorari was denied by this Court in 275 U. S. 571.

Full reliance by American nationals upon the finality of the representative character accorded to foreign ambassadors and diplomatic agents by the recognition of the State Department, is indispensable for certainty of rights. This

---

[1] Application and motion thereon for leave to file petition, etc., Actions Nos. 1 and 2, paragraphs 9, 23.

[2] Respondent's brief, pages 17-18. Mr. Ughet was at that time acting for the State of Russia in this country, the Ambassador having resigned June 30, 1922 (p. 6 above).

record illustrates the point. Upon the faith of the judgments obtained in the name of the State of Russia by Mr. Bakhmeteff and Mr. Ughet in the *Lehigh Valley* case alone, the sums of $980,431.24 and $3,673.38 were paid by the Lehigh Valley Railroad Company pursuant to order of the District Court dated December 21, 1927 (R. 243, 245-6). In addition, by virtue of the credit accorded them as representatives of the State of Russia, Mr. Bakhmeteff and Mr. Ughet disposed on behalf of the State of Russia of large sums of money standing with the National City Bank of New York in the name of Section Etrangère Ministère des Finances (R. 179) and under other titles (R. 177-82, 213). It would be indeed unconscionable if dealings of this kind could be undone by the automatic operation of a principle of retroactivity which has heretofore been applied by this Court strictly to the ascertainment of the governmental character of acts done by representatives of the new regime upon its own territory.

3. The reason for the continuing credit due the acts of the representatives of the last recognized government of Russia in this country, irrespective of the subsequent recognition of the Soviet regime which existed in Russia at the time those acts were being performed here, is of course the distinction clearly established in the authorities between the government and the State it represents. The Circuit Court of Appeals in the *Lehigh Valley* case, 21 F. (2d) 396, 400, 401, pointed out that the State is a community or assemblage of men, and the government the political agency through which it acts in international relations; that the foreign state is the true or real owner of its property, and the agency the representative of the national sovereignty: and that the granting or refusal of recognition to the Soviet

Government by the United States had nothing to do with the recognition of the State of Russia itself, which continued to enjoy recognition as an international person. In *The Sapphire,* 11 Wall. 164 (1870), this Court held that a libel filed for the French Government in the name of Napoleon III did not abate by his deposition. At page 168 Mr. Justice Bradley said:

> "The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it."

Thus the acts done by and with the petitioner by Mr. Bakhmeteff and Mr. Ughet as agents of the then recognized Provisional Government of Russia, were acts done on behalf of the State of Russia by the only agency of that State then recognized by our political department, i.e. the Provisional Government. With the propriety of that sole agency our courts were not and are not concerned. It was and is a fact. The subsequent recognition of the Soviet Government does not change the fact that for the United States the agency of the State of Russia in the period November 7, 1917, to November 16, 1933, was the Provisional Government acting by its recognized representatives. What that agency did in this coun-

try through Mr. Bakhmeteff and Mr. Ughet bound the State of Russia as fully as the acts of the Soviet Government in Russia. The judgments they collected, the acquittances they gave, the payments they received, and the legal rights which accrued and were brought to fruition by them in this country must remain final, so far as concerns the State of Russia, if the credit given by the courts to the effect of political recognition is not to be made a farce and an instrument of injustice.

4. This conclusion has indeed been recognized in the exchange of notes between the President and the Commissar for Foreign Affairs. Therein the Soviet Government formally undertook

> "not to make any claim with respect to:
>
> * * * * * * *
>
> (b) acts done or settlements made by or with the Government of the United States, or public officials, in the United States, or its nationals relating to property, credits, or obligations of any Government of Russia or nationals thereof."

The repudiation and denial of liability by the petitioner to the then officially recognized representatives of the Russian Government, with respect to the account in suit, was an act done by an American national relating to property or credits of a Government of Russia, which under the terms of the agreement of recognition is protected from question by the Soviet Government. The effect of such act in outlawing the present cause of action is thus expressly saved. The Circuit Court of Appeals for the Second Circuit so held in *State of Russia* v. *National City Bank*, 69 F. (2d) 44, 48 (1934), saying that the Soviet Government by the language quoted

> "agreed to leave undisturbed diplomatically * * * non-judicial acts done in good faith by and with the officials of the previously recognized government of Russia."

Hence, from every approach the conclusion follows that the defense of limitations, once perfected in the petitioner by the accrual of a cause of action more than six years prior to November 16, 1933, was not affected by the assignment to the United States or by the recognition of the Soviet Government.

III.

The assignment of the State of Russia to the United States does not override the state statute of limitations, and the holding of this court in the *Belmont* case has no application here.

The decision of this Court in *United States* v. *Belmont*, 301 U. S. 324, rendered May 3, 1937, came down after the District Court had entered its judgment in the instant case and during the briefing of the case on appeal. Both the opinions in the Circuit Court of Appeals rest the decision in part upon language used by this Court in the *Belmont* case (R. 284, 288, 91 F. [2d] at 900, 901). It is submitted that neither the language nor the holding of this Court in the *Belmont* case authorizes the decision below, and that the correspondence between the President and the Commissar of Foreign Affairs, constituting an executive agreement, not a treaty in the constitutional sense, could not and does not purport to modify or repeal a State statute adopted by Congress for the United States courts.

A. Neither the language nor the holding in the Belmont case authorizes the decision below.

In *United States* v. *Belmont,* this Court had before it judgments of the lower courts dismissing, for failure to state facts sufficient to constitute a cause of action, the complaint in an action brought by the United States to recover moneys under the Litvinoff assignment. The dismissal had been grounded on the holding that the public policy of the United States and of the State of New York forbade the courts to enforce the confiscatory decrees under which the moneys assigned had become the property of the Soviet Government. 85 F. (2d) 542. It did not appear that the defendants holding the moneys had any interest in the matter beyond that of a custodian. 301 U. S. at 332.

Upon these facts this Court held *merely* that the complaint stated a cause of action in that at this stage of the action no right of any American national appeared to have been affected and so the applicable public policy did not operate. The Court divided as to what public policy would govern when the question came to be raised by one having an interest. The majority, speaking by Mr. Justice Sutherland, said that the policy of the United States alone mattered. The minority, speaking by Mr. Justice Stone, said that the policy of the State of New York also mattered. But all members of the Court were in agreement (1) that no question had been effectively raised under whatever public policy was applicable, (2) that the decision made concerned only the case then presented, (3) that it concerned only the parties then before the Court, and (4) that the status of adverse claims were not affected by the decision. 301 U. S.

at 333, 337. In consequence the case was sent back to the District Court for trial after issue should be joined.

This summary of the actual decision in the *Belmont* case sharply differentiates it from the instant case. The petitioner here, defendant below, is not a stakeholder, but a *bona fide* adverse claimant. Its claim, maintained ever since February 25, 1918 (R. 81-2), is set forth in the findings of the District Court (R. 267) and acknowledged by the Circuit Court of Appeals (R. 282, 285, 91 F. [2d] at 899, 900). At R. 288, 91 F. (2d) at 902, Judge Manton speaks of the petitioner as asserting "an adverse claim" against the bank deposit. Again this petitioner invokes, not a rule of policy either State or Federal, but the statute law of New York made applicable in the United States courts by the statute law of the United States.[1] Finally, the petitioner is in this Court, not in consequence of a motion to dismiss on a point of law arising on the complaint, but after judgment obtained upon a full showing of the facts in accordance with the New York practice in support of a defense of limitations which, if maintainable in law against a foreign sovereign, is decisive of the action.

Having regard, therefore, to what this Court actually *decided* in the *Belmont* case, we believe it is manifest that that decision has no relation to the case here presented. How, then, did the *Belmont* case come to be so influential in the determination below? Because, in arriving at the choice of Federal public policy to the exclusion of State public policy as the criterion of the enforceability of the Russian decrees in the United States courts, the majority

[1] Rules of Decision Act 28 U. S. Code §725, Rev. Stat. §721.

used words which, taken out of their context, appear to have a meaning broader than the actual decision.[1]

In the *Belmont* case, the majority said (301 U. S. at 331):

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies."

It is obvious that this language was used without relation to any question (since no such question was before the Court) of the legislative force of an executive agreement, viewed *internally,* if in conflict with a State law. Again the majority said that, when judicial authority is invoked in aid of an undertaking by the United States in the field of foreign relations (301 U. S. at 332),

> "* * * state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power."

Here again the Court did not direct its attention to the question of the legislative force of an executive agreement as against a conflicting State or Federal statute, inasmuch as no such question was before it. The Court rather addressed itself to the definition of public policy made in the brief of the respondents, which at page 38 quoted *People* v. *Hawkins,* 157 N. Y. 1, 12 (1898):

> "The courts * * * have held that a state can have no public policy except what is to be found in its constitution and laws."

---

[1] The New York Court has well said: "The language of any opinion must be confined to the facts before the court. No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." *Dougherty* v. *Equitable Life Assurance Society,* 266 N. Y. 71, 88 (1934).

Manifestly, in the language of this Court employed in the *Belmont* case upon which the Circuit Court of Appeals in part rested its decision, there was no attempt to lay down a rule of decision for the totally different situation now presented. That language must be limited by the circumstances in which it was used. *Taylor* v. *Voss,* 271 U. S. 176, 184 (1926).

B. The exchange of letters of November 16, 1933, does not purport to override State and Federal statutes.

The assignment from the State of Russia (Appendix I p. 93 below) speaks of

> "the amounts admitted to be due or that may be found to be due it [the Union of Soviet Socialist Republics], as the successor of prior Governments of Russia, or otherwise, from American nationals * * *"

and with respect thereto says that the Soviet Union

> "will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment."

In acknowledgment of the note containing this language, President Roosevelt says (p. 94 below):

> "I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics * * *".

From this language of the correspondence constituting the executive agreement, it is plain that, as to amounts not admitted by any given American national to be due to the Soviet Government, the parties to the assignment contemplated litigation. It would be pursuant to such litigation, in such court as the United States as assignee would select, that such amounts as were not *admitted* to be due might be *found* to be due. Further it appears that the United States is to notify the Soviet Government of any amount *realized* by the United States in consequence of litigation.

Thus the executive agreement in question implicitly adopted the entire procedure of the forum which the United States as assignee might select for suit on the claims assigned. It does not intimate in the remotest manner an intention of either contracting sovereign to repeal any law of a state or of the United States forming part of that procedure. This fact is patent on the face of the correspondence and is indeed too clear for argument. Mr. Justice Sutherland speaking for the majority in *United States* v. *Belmont*, 301 U. S. 324, did not hold to the contrary. He held that the negotiations, acceptance of the assignment, and agreements and understandings in respect thereof were within the competence of the President speaking for the national government as vested exclusively with power over external affairs. 301 U. S. at 330. He also held that state laws or policies could not control the President in the exercise of the external powers of the United States. 301 U. S. at 331. He held finally that the only public policy relevant to the determination of the property right conveyed by the assignment, would be the public policy of the United States, although he expressly forbore to decide whether the policy of the United States as regards confiscatory foreign decrees was in any

respect different from the public policy of the State of New York.

The minority speaking by Mr. Justice Stone pointed out that the executive agreement did not purport even to affect state policy. Stating as an assumption that the United States might by treaty alter a state policy, Mr. Justice Stone said (301 U. S. at 336):

> "* * * It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden."

After referring to the correspondence, he continued:

> "There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee, is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity with those laws. Cf. *Todok* v. *Union State Bank*, 281 U. S. 449."

In *Todok* v. *Union State Bank* (1930), 281 U. S. 449, this Court had before it a treaty in the full constitutional sense between the United States and Norway, which the Supreme Court of Nebraska had held to be in conflict with the subsequently enacted homestead law of that State. Reversing the judgment of the state court, this Court pointed out that despite the liberal interpretation due to treaties to give effect to their apparent purpose (p. 455),

> "It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property law of country or location, bearing upon aliens and citizens alike."

Holding that the treaty did not override the law of the state, the court pointed out that, if it did so, it would place an alien owner of a homestead in Nebraska on a better footing than a citizen (p. 454).

The present case is an infinitely stronger one for the State law. The executive agreement alleged to be conflicting contains no hint of any intention to override any state or federal statute, no language apt for that purpose. In this case, even more clearly than in the *Todok* case, the invalidation of the state law by the executive agreement would place a foreign sovereign on a better footing than a citizen of the state or than any other suitor whatever, and would unreasonably exempt the foreign sovereign from a historic policy which in all countries and in all courts has barred stale claims in the interest of justice.

By reason of the fact that the executive agreement here involved does not even purport to interfere with existing State laws adopted by the Rules of Decision Act, we need only state the proposition that, in any event, a mere executive agreement cannot have legislative force in derogation of existing law. Constitution, Art. II, Section 2, Art. VI, Clause 2. That the exchange of letters of November 16, 1933, is not a treaty in the constitutional sense was recognized by the majority in *U. S.* v. *Belmont,* 301 U. S. 324, at 330. See also Mr. Justice Sutherland's opinion in *U. S.* v. *Curtiss-Wright Corporation,* 299 U. S. 304, 318 (1936) and his book *Constitutional Power and World Affairs* (Columbia University Press 1919) pages 120-1, 125, 137-8. In this

work he points out (p. 125) the wisdom of the constitutional requirement that a treaty which shall be the supreme law of the land, be ratified by the Senate in which every State would have an equal vote and an equal opportunity of being heard.

The attribution of legislative force to an executive agreement not constituting a treaty in the constitutional sense, with the effect of striking down a State and Federal statute which protects the petitioner in its continued adverse claim to property, would be a violation of the Fifth Amendment (R. 272). Even if the executive agreement in question were susceptible of construction as repealing or modifying a State law, which we submit it is not, a construction thereof should be avoided which would throw doubt on its constitutionality. *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 492 (1931).

CONCLUSION.

The defense of limitations has been fully sustained, the foreign sovereign's claim is subject thereto and was barred thereby before the United States acquired title, the judgment of the District Court was right, and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

March 7, 1938.

APPENDIX I.

Statutes and Executive Agreement Involved.

The Rules of Decision Act, 28 United States Code §725, Rev. Stat. §721, provides:

> *"Laws of States as rules of decision.* The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Conformity Act, 28 United States Code §724, Rev. Stat. §914, provides:

> *"Conformity to practice in State courts.* The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

The Civil Practice Act of the State of New York §48 provides, so far as material:

> "The following actions must be commenced within six years after the cause of action has accrued:
>
> 1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument."

The Civil Practice Act §15 provides, so far as material:

> "Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete except in one of the following cases:
>
> * * * * * * * *

2. Where there was a deposit of money not to be repaid at a fixed time but only upon a special demand, or a delivery of personal property not to be returned specifically or in kind at a fixed time or upon a fixed contingency, the time must be computed from the demand."

The Civil Practice Act §54 provides:

"The limitations prescribed in this article for actions other than for the recovery of real property apply alike to actions brought in the name of the people of the state, or for their benefit, and to actions by private persons."

Rule 107 of the Rules of Civil Practice of the State of New York provides, so far as material:

"Within twenty days after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint and affidavit stating facts tending to show:

* * * * * * * *

6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon."

The executive agreement concluded November 16, 1933, between the President of the United States and the People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, consisted in an exchange of letters as follows:

Washington, November 16, 1933.

My Dear Mr. President: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or

initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claims with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interest therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOV,
People's Commissar for Foreign Affairs, Union of Soviet Socialist Republics.

MR. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

The White House,

Washington, November 16, 1933.

My dear Mr. Litvinov: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

[Foregoing letter of Mr. Litvinov set forth textually except for salutation and subscription]

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

MR. MAXIM M. LITVINOV,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

APPENDIX II.

The following excerpts from the statute law and decisions of the countries of continental Europe and of Central and South America show the universality with which the local sovereign is barred by the local rule of prescription or limitation. *A fortiori*, a foreign sovereign would, under all these systems of law, be barred by the same lapse of time. The only country in which that question has been directly passed upon appears to be France, where the Paris Court of Appeal in 1867 held the Spanish Government barred by the period of prescription applicable to the French Government. In Argentina and Paraguay the statute of limitations is expressed to bind foreign states.

ARGENTINA:

Civil Code (1871):

> "Art. 34. Also foreign states, each one of their provinces or principalities, establishments, corporations or associations existent in foreign countries and which existed therein under like conditions with those of the preceding article, are juridic persons."
>
> "Art. 3951. The national or provincial state, and all juridic persons are subject to the same prohibitions as private individuals with regard to their properties or rights whch are susceptible of being private property, and they may likewise plead prescription."

Argentina ratified by Law No. 3192 of December 6, 1894, the Montevideo Treaties on Private International Law (1889). These included a Treaty of International Civil Law signed February 12, 1889, and a Treaty of International

Procedural Law signed January 11, 1889. The Treaty of International Procedural Law provides in part:

> "Art. 1. Suits and their incidents, whatever may be their nature, shall be transacted in accordance with the procedural law of the nation in whose territory they are brought."

The Treaty of International Civil Law provides in part:

> "Art. 3. The state in the character of juridic person has capacity to acquire rights and to contract obligations in the territory of another state, in accordance with the laws of the latter."
>
> "Art. 51. Extinctive prescription of personal actions is governed by the law to which the correlative obligations are subject."
>
> "Art. 56. Personal actions must be brought before the judges of the place to whose law the juridic act, which is the subject matter of the suit, is subject."

A. T. deFreitas, *Civil Code of the Argentine*, Buenos Aires, 1909, Volume I, pages 143-4, says with reference to Article 34 of the Civil Code:

> "All the writers on the public law say that nations are moral or juridic persons, and if, in addition to their internal and external relations, they can hold property in various countries, it is clear also that they are persons of civil law and that in each country they can be subjected to the jurisdiction of the civil authorities and courts."

In the following cases the courts of Argentina have allowed the defense of prescription against the State:

> *Provincia de Buenos Aires* v. *Club Mar del Plata*, June 28, 1926, 20 Jurisprudencia Argentina 575;
>
> *Provincia de Buenos Aires* v. *Compania Nacional de Grandes Hoteles*, June 28, 1926, 20 J. A. 580;

Provincia de Buenos Aires v. *Luro de Mesquita*, September 15, 1926, 22 J. A. 54;

Provincia de Buenos Aires v. *Ghibaudi*, December 20, 1930, 34 J. A. 1434.

BELGIUM.

Civil Code (1804):

> "Art. 2227. The State, public institutions, and principalities are subject to the same rules of prescription as are private persons, and may invoke them likewise."

In response to a questionnaire of the Rumanian Government as to the rights of foreign governments inheriting real estate in Belgium, in connection with the Zappa controversy between Greece and Rumania, the Belgian Minister of Justice advised (26 A. J. I. L. [1932] p. 593):

> "A foreign state to which a private individual leaves real estate situated in Belgium is there subject to all the laws which govern the matter of inheritance, *like every foreign person* inheriting in Belgium. * * *
>
> "These conclusions flow from two rules which are themselves based on the principle of the sovereignty and of the mutual independence of nations, viz:
>
> "1. That, apart from the buildings of foreign legations and their dependencies, the real property which a foreign state possesses in a foreign country does not cease to form part of the territory of such country;
>
> 2. That a foreign state can own property abroad *only in the right of a civil person;* that in taking the status of heir in a foreign country, it assumes a purely civil status and not the status of a government in the exercise of its *imperium* (Decree of the Court of Brussels, July 1, 1891. *Debock* v. *Congo State*, Decree of the Court of Ghent, March 14, 1879. *Vanden Abeele* v. *State of Peru*, Pasic. 1879, p. 17 et seq.)."

Bolivia.

Bolivia ratified by law of November 5, 1903, the Montevideo Treaty of International Civil Law and the Treaty of International Procedure Law (pp. 96-7 above).

Bolivia has also ratified the Pan-American Code of Private International Law, signed at the Sixth International Conference of American States at Havana in 1928. This Code provides in part:

"Art. 31. Each contracting state, as a juristic person, has full capacity to acquire and exercise civil rights and to assume obligations of the same character within the territory of the others, without restrictions other than those expressly established by the local law."

"Art. 229. Extinctive prescription of personal actions is governed by the law of the place where the object to which it refers is situated."

"Art. 333. The judges and courts of each contracting state shall be incompetent to take cognizance of civil or commercial cases to which the other contracting states or their heads are defendant parties, if the action is a personal one, except in case of express submission or of counterclaims."

Brazil.

Civil Code (1916):

"Art. 13. Juridic persons are of public law, internal, or external, and of private law.

Art. 14. Juridic persons of internal public law are:

I. The Union.

II. Each of its States and the Federal District.

III. Each of the legally constituted Municipalities."

"Art. 163. Juridic persons are subject to the effects of prescription and can invoke it whenever it is to their benefit."

Civil Code (1885):

> "Art. 2497. The rules relative to prescription are applied in favor of and against the State, churches, municipalities, national establishments and corporations and private individuals who have the free administration of what is theirs."

The courts of Chile have sustained the defense of extinctive prescription (limitations) against the Chilean Government as plaintiff in

> *Fisco con. Urriaga,* Gaceta de los Tribunales, 1883, page 1129;
>
> *Fisco con. Goyenechea,* Id., 1889, volume II, page 358.

In *Inscription de bienes raices del Gobierno de Bolivia,* Gaceta de los Tribunales, 1912, volume II, page 813, 26 A. J. I. L. Supp. (1932) page 584, the Supreme Court of Chile affirmed a judgment permitting recordation of a deed for real estate purchased by the Bolivian Government, saying:

> "Considering:
>
> 1. That, according to the rules of International Law, States in their mutual relations have a juridical personality enabling them to acquire rights and contract obli- persons."
>
> 2. That the property situated in a country is ruled by its laws, that natural as well as juristic persons may acquire it, subject to the legal regulations that control the rights and obligations relative to such goods.
>
> 3. That these principles do not suffer any modification in the case of property that may be acquired by a foreign government, because according to International

Law property can be acquired by a State in the territory of another State, without exercising upon it more than the ordinary power allowed to an individual, and not the power that always pertains to the sovereign of the territory. * * *"

COLOMBIA.

Law 153 of 1887:

"Art. 80. The Nation, Departments, Municipalities, public charitable establishments and schools, and the corporations created or recognized by law, are juridic persons.

Civil Code (1873):

"Art. 2517. The rules relative to prescription are applied equally in favor of or against the Nation, the Territory, the Municipalities, the establishments and corporations and the private individuals who have free administration of their property."

Colombia by Law 40 of 1933 and by Law 68 of 1920 adhered to the Montevideo Treaties on International Civil Law and on Procedure Law (pp. 96-7 above).

The courts of Colombia have allowed the defense of prescription to be invoked in actions brought by the Government in the following cases:

Nacion v. *Zapata*, judgment dated June 28, 1920, 28 Gaceta Judicial 96;

Nacion v. *The Barranquilla Railway & Pier Company, Ltd.*, judgment dated November 15, 1920, 28 Gaceta Judicial 252;

Departamento del Tolima v. *The Dorada Extension Railway, Ltd.*, judgment dated November 4, 1930, 38 Gaceta Judicial 418;

Nacion v. *Pedrosa*, judgment dated May 20, 1935, 42 Gaceta Judicial 75;

Nacion v. *Trujillo*, judgment dated June 21, 1935, 42 Gaceta Judicial 228;

Nacion v. *Gamboa Guzman & Co.*, judgment dated August 14, 1936, 44 Gaceta Judicial 250;

Nacion v. *Guevara y Bourdon*, judgment dated October 19, 1936, 44 Gaceta Judicial 385;

Nacion v. *Bechara Hermanos*, judgment dated December 1, 1936, 44 Gaceta Judicial 577.

Julian Restrepo-Hernandez, in his work *Derecho Internacional Privado* (2nd Ed., Bogota, 1928), volume I, says:

"103. States are juridic persons before every other State; they do not require any recognition or legalization whatever; they are called *necessary juridic* persons. When a new State is formed, either by emancipation from the metropolis, as happened with our country, or by dismemberment from another, as Uruguay, then it is customary for States to recognize the new nationality.

104. The private rights which a State may acquire exercise or assert within another State are subject to the limitation which the latter imposes, consulting its security or basing itself on juridic reasons * * *."

COSTA RICA.

Civil Code (1888):

"Art. 6. Prescription and everything concerning the mode of performing or extinguishing obligations resulting from any juridic act or contract to be performed in Costa Rica, shall be governed by Costa Rican laws, even though the parties be foreigners and the act or contract may not have been performed or entered into in the Republic."

"Art. 15. The existence of civil [juridic] persons arises from the law, excepting that of the State which is of full right a perpetual moral [juridic] person."

"Art. 27. Every civil [juridic] person in its contractual juridic relations is on an equality with the natural person and remains subject to the same requirements of the common law."

Costa Rica has ratified the Pan-American Code of Private International Law (p. 99 above).

CUBA.

Civil Code (1899):

"Art. 35. The following are juridic persons:

1. The corporations, associations and foundations of public interest recognized by law.
Their legal status commences from the moment they may have been validly constituted, pursuant to law.

2. The associations of private interest, whether civil, mercantile or industrial, upon which the law confers their own legal status, independent of the status of each one of the associates.

Art. 1932. Rights and actions are extinguished by prescription in prejudice of every class of persons, including juridic persons, in the conditions provided by law."

Cuba has ratified the Pan-American Code of Private International Law (p. 99 above).

DOMINICAN REPUBLIC.

Civil Code (1884):

"Art. 2227. The State, the public establishments and the municipalities, are subject to the same prescriptions as individuals, and may oppose them in the same manner as the latter may."

The Dominican Republic has ratified the Pan-American Code of Private International Law (p. 99 above).

ECUADOR.

Civil Code (1887):

> "Art. 2479. The rules relating to prescription are applied equally in favor of or against the State, churches, municipalities, national establishments and corporations, and private individuals who have the free management of their own [properties and rights]."

Ecuador has ratified the Pan-American Code of Private International Law (p. 99 above).

ENGLAND.

The English cases assimilating foreign sovereign plaintiffs in all respects to private corporations for purposes of cross-bill, discovery, costs, etc., are discussed in the foregoing brief (pp. 39-43 above).

John Selden in his *Table Talk* (Ed. Pollock 1927, p. 68) says:

> "The King of Spain was outlawed in Westminster Hall, I being of counsel against him. A merchant had recovered costs against the King of Spain in a suit, which because it could not be got, we advised to have him outlawed for his not appearing; and so he was. As soon as Gondomar [the Spanish Ambassador] heard that, he presently sent the money, by reason if his master had stood outlawed he could not have had the benefit of the law, which would have been very prejudicial, there being then many suits depending between the King of Spain and our English merchants."

Westlake says in *Private International Law* (7th Ed. p. 272):

> "A foreign sovereign or person entitled to the privilege of ex-territoriality, bringing an action in England will be bound, as a private corporation or person would be bound, to do complete justice to the defendant with

regard to the matters comprised in the action and will be subject to all cross-actions, counter-claims, defenses and steps of procedure which as between private parties, would be competent to the defendant for the purposes either of obtaining such complete justice or of defending himself against the plaintiff's claim. It was the old maxim of the Court of Chancery: 'That he who seeks equity must do equity.'"

FRANCE.

Civil Code (1804):

"Art. 2227. The State, public institutions, and principalities are subject to the same rules of prescription as are private persons, and may invoke them likewise."

Aubry & Rau, *Droit Civil*, Volume II, §211, say:

"The defense of the statute of limitations is in principle available as against all physical persons and legal entities. * * * Thus one can avail oneself of this defense against the State * * * just as in the same manner one can against any private individual."

A foreign State was held to be barred by Article 2227 in *Gouvernement espagnol* v. *Veuve et heritiers d'Aguado*, Dalloz 1867 II, page 49, Sirey 1867 II, page 214. From 1826 on Aguado had been a financial agent for the Spanish Government. His last account was rendered in 1832. This account was not accepted by the Spanish Government, and correspondence ensued. In 1863, Aguado having died, the Spanish Government sued his estate for Fr. 3,611,201. The Civil Tribunal of the Seine sustained the defense of limitations, saying in part:

"Whereas the complaint of the Spanish Government is dated November 16, 1863; the last of the accounts being dated December 31, 1932, all the accounts are covered by prescription; this is true therefore for all the amounts carried or omitted in these accounts and

there is no need to ascertain the precise date when prescription began to run for each of them;

Whereas the Spanish Government did, it is true, raise protests almost at once concerning the accounts presented by Aguado; it immediately engaged in correspondence on this point; it requested the opinion of the officials under its direction, appointed committees, sent agents to Aguado to settle with him, proposed an arbitration; the Government in 1850 applied to the widow Aguado, Marquise de Las Marismas, and stated at that time its purpose of going before the courts; Aguado on the other hand employed the same diligence in taking measures to reach a settlement with the Spanish Government; he answered at once all the objections made to him; he got into touch with persons who had the confidence of the Spanish Government; he even sent representatives to Madrid; but all these facts do not prove a novation or interruption of prescription, which could take place only by the filing of a complaint similar to that which took place belatedly November 16, 1863;

Whereas the nature of Aguado's possession has on behalf of the Spanish Government been attacked to no avail, and the point made to no avail that it could not give rise to prescription; there is involved in this case an extinctive prescription for which no question of possession or question of good faith can be raised; in addition Aguado has always asserted his rights with respect to the sums in controversy, and this controversy, arising from the interpretation of agreements, gives no ground to question the good faith of either party."

On the appeal of the Spanish Government, the Paris Court of Appeal affirmed the judgment upon the opinion of the Civil Tribunal.

In *Dame de Latude et al* v. *S. S. Leon XIII et al,* Clunet (1892) page 447 (1893) page 731, 26 A. J. I. L. Supp. (1932) page 595, the Civil Tribunal of Montdidier held that the Pope could inherit in France as a foreign sovereign, but only subject to the special authorization required of all persons by Civil Code Art. 910. The Court said in part:

"Foreign States as a matter of absolute right and necessity constitute moral persons of the first order capable of obligating themselves, of acquiring, and of receiving by treaties and *a fortiori* by contracts or acts of civil law; the capacity of each State, complete in its own sphere, is limited so far as concerns its acquisitions in the sphere of other states, by the sovereignty of the latter, by their legislation, and by international practice * * *."

GERMANY.

In response to a questionnaire of the Rumanian Government as to the rights of foreign governments inheriting real estate in Germany, in connection with the Zappa controversy between Greece and Rumania, the law faculty of the University of Berlin gave the following opinion in part (20 Clunet [1893] 727, 739):

"II. The State which claims property on the basis of a testamentary disposition, discards its role of sovereign power, in order to become a simple juristic person placing its private rights under the protection of the laws applicable to all citizens. The German Treasury on the other hand is subject to the jurisdiction of the ordinary courts when the controversy refers to interests other than those which the Government in the interest of the fulfilment of its high political and social mission, is charged with protecting. One can invoke against the Treasury, there is no doubt as matter of principle, the application of the rules of the common law."

GUATEMALA.

Civil Code (1933):

"Art. 15. The following are juridic persons:

1. The State, the municipalities, the institutions, foundations and corporations of public character, created or recognized by the law * * *"

"Art. 1050. The State, as well as the Municipalities and all public establishments are considered as private persons in respect of prescription."

Guatemala has ratified the Pan-American Code of Private International Law (p. 99 above).

HAITI.

Civil Code (1825):

"Art. 1995. The State is subject to the same prescriptions as individuals and may equally oppose such prescriptions."

Haiti has ratified the Pan-American Code of Private International Law (p. 99 above).

HOLLAND.

Civil Code:

"Art. 1991. The State, public institutions, and principalities are subject to the same rules of prescription as are private persons, and may invoke them likewise."

Cremers in *Aantekeningen op. de Nederl.-Wetboeken*, §1287, says in commenting upon Article 1991:

"* * * The rules of the Civil Code concerning prescription are applicable also to claims based upon relations between a citizen and a State in its sovereign capacity * * *"

HONDURAS.

Civil Code (1906):

"Art. 56. The following are juridic persons:

1. The State and the corporations, associations and foundations of public interest, recognized by law * * *

Art. 2265. Rights and causes of action are extinguished by prescription in prejudice of every class of persons, including juridic persons, in the terms provided by law."

Honduras has ratified the Pan-American Code of Private International Law (p. 99 above).

ITALY.

Civil Code:

"Art. 2114. The State, public institutions, and Municipalities are subject to the same rules of prescription as private persons are, and can invoke them likewise."

MEXICO.

Civil Code for Federal District and Territories (1932):

"Art. 25. The following are moral [juridic] persons:

I. The Nation, the States and the Municipalities;

II. Other corporations of public character recognized by law * * *

Art. 1137. Except as may be otherwise established by law, only the properties and obligations which are in commerce may be subject to prescription.

Art. 1148. The Union, the Federal District and Territories, as the case may be, as well as the Municipalities and other moral [juridic] persons, shall be considered as private persons in regard to prescription of their properties, rights and causes of action which may be susceptible of private ownership."

NICARAGUA.

Civil Code (1904):

"Art. 878. The State and all other juridic persons are subject to prescription the same as individuals."

Nicaragua has ratified the Pan-American Code of Private International Law (p. 99 above).

PANAMA.

Civil Code (1926):

"Art. 38. * * * A juridic person is a moral entity or fictitious person, of political, public, religious, industrial or commercial character, represented by a natural person or persons, capable of exercising rights and contracting obligations.

Art. 64. The following are juridic persons:

1. The political entities created by the Constitution or by the Law * * *

Art. 1670. Rights and causes of action are extinguished by prescription in prejudice of every class of persons, including juridic persons * * *

Notwithstanding the provisions in the foregoing paragraphs, the national vacant lands are not prescribable."

Panama has ratified the Pan-American Code of Private International Law (p. 99 above).

PARAGUAY.

Civil Code (1889):

"Art. 34. Also foreign states, each one of their provinces or municipalities, establishments, corporations or associations existent in foreign countries and which exist therein under like conditions with those of the preceding article, are juridic persons."

Art. 3951. The National or Provincial State, and all juridic persons are subejct to the same prescriptions as private individuals, with regard to their properties or rights which are susceptible of being private property, and they may likewise plead prescription."

Prescription has been successfully pleaded against the Paraguayan Government in an action by it to rescind a con-

tract of sale of land on the ground of mistake, in *Fisco contra Saguier y Riquelme*, reported in *Fallos y Disposiciones del Superior Tribunal de Justicia*, 1899, page 333.

By law of September 3, 1889, Paraguay ratified the Montevideo Treaties of Private International Law (pp. 96-7 above).

PERU.

Peru has ratified the Pan-American Code of Private International Law (p. 99 above).

IMPERIAL RUSSIA.

Civil Laws Volume X, Part 1, Code of Laws of the Russian Empire, Art. 694 Note, Annex Art. 1 (1837):

> "The legal term, established for beginning of litigation and action concerning both immovable and movable property, as well between private parties as between them and the State Treasury, is ten years. * * *"

This provision of the Russian Civil Code was held by the highest Russian court of appeal, the Ruling Senate, to apply to actions wherein the sovereign or an agency of the sovereign was a party. Under this provision the Imperial Russian Government was held by the Ruling Senate to be barred in actions brought by its agencies in the following cases: No. 60 for the year 1879; No. 858 for the year 1874; No. 325 for the year 1879 and No. 72 for the year 1879.

In the first case, No. 60 of 1879, a Representative of the Treasury Department brought an action to recover damages sustained by the Treasury Department and caused by a fire. On appeal to the Senate, that Court held:

> "* * * the main grounds for the decision of the Appellate Division are based on the fact that the ten year period of statutory prescription had run from the time

of the fire; such ruling of the Appellate Division is in full accord with the provisions of the law concerning limitation of actions (Art. 213 of Vol. X, Part 2, and Art. 694 of Vol. X, Part 1), by virtue of which provision the ten year period for bringing actions for damages sustained by unauthorized or illegal acts starts to run from the time when the cause of action accrues, and when an action can be brought to recover such damages, i.e., from the time when the damages were actually inflicted * * *; *the law does not provide for any exceptions to this general rule for the computation of the period of limitations with respect to State agencies or governmental institutions.*"

In the second decision above mentioned, No. 858 of 1874, a representative of the Department in Charge for State Property brought an action against a contractor for breach of contract and for damages sustained thereby by the Government. The defense of the statute of limitations was interposed. The Court held that under Sec. 694 of Vol. X, Part 1, all actions are barred by the general ten-year period of prescription, irrespective of whether the parties to the litigation are private citizens or Government institutions, saying:

> "No exceptions have been provided for with reference to claims of the Treasury arising out of the nonperformance by private individuals of their obligations under contracts entered into between the State and private individuals for the supply and delivery of goods to the State."

SOVIET RUSSIA.

Civil Code (1923):

> "Art. 44. The right to institute actions shall terminate upon the expiration of a three-years period (statutory limitation) unless some other term of statutory limitation is established in the law."

Soviet law does not recognize acquisitive or possessory prescription but does recognize extinctive prescription (limitations). Hence cases can be cited in which the defense of acquisitive prescription has failed in an action brought by the Soviet State. But in *Administration of Siberian Railroads* v. *Representative of the Superior Council of Peoples Economy,* in Collection of Decisions of the Civil Cassation Collegium of the Supreme Court of the R. S. F. S. R. (1929), No. 40, page 51, Case No. 31470 for the year 1924, the Supreme Court of Soviet Russia applied extinctive prescription (limitations) against the State agency which was a party to the litigation. A ruling entitled *Explanation of Plenum of Supreme Court of R. S. F. S. R., Protocol No. 10,* June 29, 1925 has been cited for the proposition that the statute of limitations does not apply to suits by the Soviet State or its agencies; but thereafter the Presidium of the Supreme Court of the R. S. F. S. R., affirming a decision of the Civil Cassation Department, in effect restricted the decision of June 29, 1925 to ownerless property which, by virtue of Civil Code Art. 68, was conceived as State property. Collection of Interpretations of the Supreme Court of the R. S. F. S. R. (State Law Publishing Concern, Moscow 1930), page 45.

On April 1, 1929 the Civil Cassation Collegium of the Supreme Court of the R. S. F. S. R. applied the three-year statute of limitations to an action brought by the Moscow Soviet of National Economy, a State agency, to recover rental from citizens for premises occupied by them in a nationalized building. Decisions of the Cassation Collegium June 17, 1929, Case No. 3854. The Court said:

"The Civil Cassation Collegium finds that the decision of the court in the part of the refusal to apply Article 44 of the Civil Code to the present litigation of the parties dealing with the amount of the recovery is incorrect on the following grounds: pursuant to the interpretation of the Plenum of the Supreme Court of the R. S. F. S. R. of June 29,[19]25, the statute of limitation does not extend to actions of State organs for the recovery of property, whereas in other cases Article 44 of the Civil Code retains its effect also in the case of State organs.

The case at Bar deals with the recovery from the defendants of rental money, that is, the claim arises out of contractual relations; consequently, the court had no ground for the refusal to apply Article 44 of the Civil Code."

Other cases such as *Narkomprod* v. *Moxselprom*, April 17, 1923, 2 Dec. V. A. K. (Supreme Arbitration Council) No. 98; *Saratov Gubkomotdel* v. *Riazan-Ural R. R.*, May 3, 1923, 3 Dec. V. A. K. No. 106, being actions between Soviet State institutions, refused to apply the three-year statute of limitations on the ground that the actions were administrative actions involving public rights, not civil actions involving civil rights. It is indisputable, however, that an action by a foreign sovereign in the courts of Russia, if permitted, would be held not to involve public rights or to be an administrative action and would be subject to the three-year statute of limitations.

SALVADOR.

Civil Code (1860):

"Art. 2407. The rules relating to prescription are applied equally in favor of or against the State, churches, municipalities, national establishments and corporations, and private persons who have the free management of their own [property and rights]."

Salvador has ratified the Pan-American Code of Private International Law (p. 99 above).

SPAIN.

Civil Code (1888):

"Art. 35. The following are juridic persons:

1. Corporations, Associations and Foundations of public interest recognized by the law. * * *

2. Associations of private interest, whether civil, mercantile or industrial, to which the law concedes their own personality, independent of that of each one of the associates.

Art. 38. Juridic persons may acquire and possess properties of all classes, as well as contract obligations and exercise civil or criminal actions, in conformity with the laws and rules of their constitution.

Art. 1932. Rights and actions are extinguished by prescription to the prejudice of every class of persons, including juridic persons, in the terms provided by the law. * * *"

In Spain as elsewhere foreign states are juridic persons, subject to the local rule of prescription or limitations. Lasala-Llanas, *Sistema de Derecho Civil Internacional e Interregional* (Madrid, 1933), page 96 says:

"Foreign States, in their quality of juridic persons, as foreign public corporations, have capacity to acquire and exercise civil rights and to contract obligations of like class in Spanish territory, without other restrictions than those which treaties or special laws may determine.

Neither the laws nor the decisions offer particular rules concerning the civil personality of foreign States. Practically, it is supposed that such capacity is recognized in the same regimen of equality as other juridic persons, at least in the acquisition and exercise of those

civil rights necessary for the fulfillment of the proper ends of the State in the political, administrative and international order."

URUGUAY.

Civil Code (1868):

"Art. 21. All individuals of the human species are persons. The State, the fisc, the municipality, the church and the corporations, establishments and associations recognized by public authority are considered to be juridic persons and consequently capable of civil rights and obligations.

Art. 1194. The State, with respect to properties susceptible of private ownership, the public establishments and corporations, are subject to the same prescriptions as are private individuals, and they may oppose prescription as private individuals may. * * *"

By law of October 3, 1892 Uruguay adhered to the Montevideo Treaties on International Civil Law and Procedural Law (pp. 96-7 above).

VENEZUELA.

Civil Code (1922):

"Art. 17. The Nation, the political entities which compose it, the churches, universities, and, in general, all moral beings or bodies of public character, are juridic persons and therefore, capable of rights and obligations * * *

Art. 2032. The State as to its patrimonial properties, and all juridic persons, are subject to prescription, the same as individuals."

Venezuela has ratified the Pan-American Code of Private International Law (p. 99 above).

FILE COPY

Office - Supreme Court, U. S
FILED
APR 4 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 566.

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

April 4, 1938.

THE BALLOU PRESS NEW YORK

INDEX.

PAGE

Scope of Respondent's Brief 1

Summary of Argument Herein 2

I. As to Respondent's Attempt to Create an Issue of Fact (brief, Part One pp. 12-31) 2

A. Petitioner's repudiation 3

B. Respondent's unfair account of notice of repudiation 3

C. Questions of law exclusively raised by respondent 7

D. Uncontradicted evidence of demand by the State of Russia... 9

E. Improper reference by respondent to settlement negotiations.. 10

F. Adequacy of present record 12

II. As to Respondent's Attempt to Limit the Authority of the Russian Ambassador and Financial Attaché Accredited and Recognized by It During the Period 1917-33 (brief, pp. 31-49).. 13

A. The retroactivity of recognition does not affect notice given to a diplomatic representative of Russia recognized by the State Department at the time..... 14

B. Respondent's effort in its brief to qualify and repudiate the status due the Russian Ambassador and financial attaché by virtue of the recognition accorded them by respondent prior to November 16, 1933, must fail 16

C. Respondent's attempt to alter the record after judgment, should be denied 25

D. The test of the running of limitations is the right of the State of Russia to sue, not the right of the Soviet Government to sue. 27

III. As to the Claimed Exemption of Foreign Sovereigns from State Statutes of Limitations (Respt.'s brief, Part Two, pp. 49-82) 28

A. The Rules of Decision Act authorizes the application of State laws to foreign sovereigns exactly as to private litigants.... 29

B. The New York statute of limitations binds foreign sovereigns 33

C. Respondent's dilemma between an inequitable rule and applying the doctrine of laches to foreign sovereigns 38

D. The doctrine of sovereign immunity is wholly irrelevant..... 39

E. As to the alleged lack of power to bind a foreign sovereign by a statute of limitations 43

IV. As to the Alleged Revival of the Barred Claim in the Hands of the United States (Respt.'s brief, Part Three, pp 82-90) 45

PAGE

A. Under the Federal Rules of Decision Act a state statute of limitations is made applicable to a law action by the United States in the Federal Courts as assignee of a claim which has already been barred by the State statute of limitations 45

B. The remedy of the United States is barred by the New York statute of limitations 47

C. Upon the circumstances of this case petitioner has a vested right in the account 53

V. As to the Alleged Conflict Between the New York Statute of Limitations and the Litvinoff Assignment (Respt.'s brief, Part Four, pp. 90-7) 55

Conclusion 58

Appendix III 59

Cases Cited.

Administrator of Austrian Property v. Russian Bank for Foreign Trade, 48 T. L. R. 37 45
Agency of Canadian Car & Foundry Co. v. American Can Co., 258 F. 363 ..... 17, 18
Anne, The, 3 Wheat. 436 21
Armstrong v. Morrill, 14 Wall. 120 39
Baltimore Pearl Hominy Co., In re, 5 F. (2d) 553 9
Baron Penedo v. Johnson, 29 L. T. 452 20
Bell v. Morrison, 1 Pet. 351 ..... 47, 49, 50
Bennett v. Devlin, 56 Ky. 353 48
Bloodgood v. Bruen, 8 N. Y. 362 51
Blythe v. Hinckley, 180 U. S. 333 44
Brooklyn Bank v. Barnaby, 197 N. Y. 210 50
Butler v. Johnson, 111 N. Y. 204 50
Campbell v. Holt, 115 U. S. 620 ..... 49, 54
Cherokee Nation v. Georgia, 5 Pet. 1 21
Colombian Government v. Rothschild, 1 Sim. 94 21
Commissioners of the Sinking Fund of Louisville v. Buckner, 48 F. 533 ..... 35, 41
Compania Española de Navegacion Maritima S. A. v. SS. Navemar, No. 242, October Term 1937, decided January 31, 1938 ..... 21, 41
Cooke, In re, 19 Fed. 38 51
Cooke v. U. S., 91 U. S. 389 41
Courtenay v. Williams, 3 Hare 539 41
Dame de Latude v. S. S. Leon XIII et al., Clunet (1892) page 447 (1893) page 781, 26 A. J. I. L. Supp. 1932 page 595 31
Davis v. Ballard, 1 J. J. Marsh. 563 41
Davis v. Bowsher, 5 Term Rep. 488, 491 50
Davis, The, 10 Wall. 15, 21 40
De Biasi v. Normandy Water Co., 228 F. 284 51
Delahunty v. Central National Bank, 87 App. Div. 434 9
Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F. (2d) 705, cert. den. 275 U. S. 497, and 300 F. 891, aff'd 32 F. (2d) 195 43
Dickinson v. Del Solar [1930] 1 K. B. 376 21

PAGE
Don Diego de Acuna v. Bingley, Hob. 78 20
Donnelly v. Anderson Brown & Co., 275 F. 433 13
Dooley v. U. S., 182, 222 56
Dougherty v. National City Bank of New York, 157 Misc. 849 11
Dowell v. U. S., 86 F. (2d) 120 28
Draper v. Glassop, 1 Ld. Raym. 153 48
Exchange, The, 7 Cranch 116 30
Falcon, The, 19 F. (2d) 1009 51
Falkland v. St. Nicholas National Bank of New York, 84 N. Y. 145 ..... 53, 54
Fink v. O'Neil, 106 U. S. 272 33
Fisk, Ex Parte, 113 U. S. 713 13
Fourteen Diamond Rings v. U. S., 183 U. S. 176 26
Francis v. Rycroft, 148 A. D. 65 12
French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427..29, 34, 41
Geofroy v. Riggs, 133 U. S. 258 44
Georgia v. Chattanooga, 264 U. S. 472 ..... 35, 37
Gibson v. Chouteau, 13 Wall. 92 39
Gouvernment espagnol v. Veuve et heritiers d'Aguado, Paris Court of Appeal Dallox 1867 II 49, Journ. du Palais 1869 p. 118 .....36, 37
Graves v. Grave's Executor, 2 Bibb 207 48
Hands v. Louisiana, 134 U. S. 1 41
Harper v. Fairley, 53 N. Y. 442 50
Haver v. Yaker, 9 Wall. 32 56
Hayward vs. National Bank, 96 U. S. 611 39
Head's Executor v. Manners' Adm'rs., 5 J. J. Marsh. 255 50
Heaton v. Leonard, 69 Hun 423 11
Henderson v. Mayor of New York, 92 U. S. 259 32
Henry v. Root, 33 N. Y. 526 .....49, 50
Hildebrand v. Kinney, 172 Ind. 447 51
Home Insurance Co. v. Baltimore Warehouse Co., 93 U. S. 527 11
Hopkins v. Lincoln Trust Company, 233 N. Y. 213 49
Hopkirk v. Bell, 3 Cranch 454 .....56, 58
Hulbert v. Clark, 128 N. Y. 295 49
Hullett v. King of Spain, 2 Bligh N. S. 31 20
Huntington v. Attrill, 146 U. S. 657 38
Huntington v. Attrill, [1893] A. C. 150 38
Inscription de bienes raices del Gobierno de Bolivia, Gaceta de los Tribunales, 1912, volume II, p. 813, 26 A. J. I. L. Supp. p. 584.. 35
Jones v. U. S., 137 U. S. 202 .....14, 18
Kawananakoa v. Polyblank, 205 U. S. 349 30
King, The, v. Morrall, 6 Price 24 .....45, 46
King of Spain v. Hullett, 7 Bligh N. S. 359 37
Kingdom of Roumania v. Guaranty Trust Company, 250 F. 341, cert. den. 246 U. S. 668 42
Lehigh Valley R. Co. v. State of Russia, 293 F. 133, 293 F. 135, aff'd 21 F. (2d) 396, writ of prohibition denied 265 U. S. 573, cert. den. 275 U. S. 571 .....15, 17, 18, 19, 21, 27, 29
Lightfoot v. Davis, 198 N. Y. 261 47
Louisiana v. Texas, 176 U. S. 1 41
Magdalen College case, 11 Co. Rep. 66b 29
Manhattan Top & Body Co. v. White Co., 78 Misc. 401 11
McArthur v. Goddin, 75 Ky. 279 48
McLaren v. McMartin, 36 N. Y. 88 51
Meeks v. Olpherts, 100 U. S. 564 28
Miller v. Davis, 88 Me. 454 9

PAGE

Minturn v. U. S., 106 U. S. 437 39
Monaco v. Mississippi, 292 U. S. 313..... 53
Muir, Ex Parte, 254 U. S. 522..... 42
Nielsen v. Johnson, 279 U. S. 47..... 56
Novisima Recopilacion; Book XI, Tit. 8, Law 5..... 36
Penza, The, 277 F. 91.....15, 17, 19
People's Trust Co. v. O'Neill, 273 N. Y. 312.....50, 51
People v. St. Nicholas Bank, 44 A. D. 313, 318-19..... 54
Poole v. Poole, 7 Ch. App. 17..... 47
Republic of Honduras v. Soto, 112 N. Y. 310.....33, 44
Republic of Mexico v. De Arangoiz, 5 Duer (12 N. Y. Super.) 634.. 21
Rex v. International Trustee for the Protection of Bondholders [1937] A. C. 500, 530-1 31
Robinson v. Robins Dry Dock & Repair Co., 288 N. Y. 271.....49, 54
Rogdai, The, 278 F. 294, 279 F. 130.....15, 17, 21
Royal Italian Government v. International Committee of Y. M. C. A., 273 N. Y. 468 41
Sapphire, The, 11 Wall. 164..... 27
Schneider v. Lizardi, 9 Beav. 461..... 28
Schutz v. Morette, 146 N. Y. 137.....50, 51
Shoemaker v. Benedict, 11 N. Y. 176..... 56
Smart v. Baugh, 3 J. J. Marsh. 363..... 48
Smart v. Johnson, 3 J. J. Marsh. 373..... 48
Smith v. U. S., 5 Pet. 292 39
Smith v. Weguelin, L. R. 8 Eq. 198..... 37
South Dakota v. North Carolina, 192 U. S. 286.....52, 53
Spencer v. Hemmerde, [1922] 2 A. C. 507..... 49
State of Pennsylvania v. Wheeling Bridge Co., 18 How. 518..... 35
State of Russia v. Bankers Trust Co., 4 F. Supp. 417, affirmed sub. nom. U. S. v. National City Bank, 83 F. (2d) 236, cert. den. 299 U. S. 563 19
State of Russia v. National City Bank, 69 F. (2d) 44..... 23
State of Texas v. White, 7 Wall. 700..... 27
Suarez v. Suarez [1918] 1 Ch. 176 ..... 21, 22
Tebo v. Robinson, 100 N. Y. 27 11
Tennant v. Dudley, 144 N. Y. 504 11
Tillman v. Guaranty Trust Company, 253 N. Y. 295.....8, 9, 44
Tillman v. National City Bank and Guaranty Trust Company, 276 N. Y. , decided January 11, 1938.....34, 49, 54
Todok v. Union State Bank, 281 U. S. 449..... 53
Union Bank v. Deshell, 139 A. D. 217..... 11
U. S. S. R. v. National City Bank, New York Law Journal February 15, 1938 23
U. S. v. Arredondo, 6 Pet. 691..... 57
U. S. v. Bank of New York Trust Co., 77 (2d) 866 aff'd 296 U. S. 463 .....51, 53
U. S. v. Beebe, 127 U. S. 338.....39, 44
U. S. v. Belmont, 301 U. S. 324.....1, 51, 53
U. S. v. Buford, 3 Pet. 12.....45, 46, 47, 48, 49, 51, 53
U. S. v. California, 297 U. S. 175..... 29
U. S. v. Curtiss-Wright Corporation, 299 U. S. 304..... 33
U. S. v. Harpootlian, 24 F. (2d) 646..... 33
U. S. v. Hoar, Fed. Cas. No. 15,373, p. 330.....29, 31, 44
U. S. v. Insley, 130 U. S. 263 33
U. S. v. Knight, 14 Pet. 301..... 33
U. S. v. Mack, 295 U. S. 480 33

PAGE
U. S. v. McRae, L. R., 8 Eq. 69 ..... 28, 52
U. S. v. Minnesota, 270 U. S. 181 41
U. S. v. Nashville etc. R. Co., 118 U. S. 120 ..... 32, 39, 45, 46
U. S. v. National City Bank, 83 F. (2d) 236, cert. den. 299 U. S. 563 ..... 33, 51
U. S. v. Oregon Lumber Co., 260 U. S. 290 ..... 40, 54
U. S. v. President and Directors of The Manhattan Company, 276 N. Y. 396 51
U. S. v. Prioleau, H. & M. 558 ..... 28, 52
U. S. v. Rauscher, 119 U. S. 407 32
U. S. ex rel. Skinner & Eddy v. McCarl, 8 F. (2d) 101 51
U. S. v. Thompson, 98 U. S. 486 ..... 29, 30, 31, 38, 46
U. S. v. White, 2 Hill 59 45
U. S. v. Wilder, 13 Wall. 254 11
Van Keuren v. Parmelee, 2 N. Y. 523 50
Vladikavkazsky R. Co. v. New York Trust Co., 263 N. Y. 366 8
Voevodine v. Government of the Commander-in-Chief of the Armed Forces in the South of Russia, 232 A. D. 204 ..... 28, 52
Wainford v. Barker, 1 Ld. Raym. 232 47
Wakeman v. Sherman, 9 N. Y. 85 12
Ware v. Hylton, 3 Dall 199 56
Wemyss Furniture Co. v. Strober, 199 A. D. 449 11
Western Lunatic Asylum v. Miller, 29 W. Va. 326 ..... 34, 41
Wilber National Bank v. U. S., 294 U. S. 120 46
Willard vs. Wood, 164 U. S. 520 39
Wisconsin v. Pelican Insurance Company, 127 U. S. 265 41
Zappa case, 26 A. J. I. L. (1932) p. 593, 29 Clunet (1893) 727 35
Zellerbach Paper Co. v. Helvering, 293 U. S. 172 29

Other Authorities.

Angell on Limitations (6 ed.) pp. 240-1 51
Bracton, De Legibus, Lib. ii, c. 5, section 7 31
Combined Annual Reports of the World War Foreign Debt Commission, 1922-6, p. 68 24
2 Cooley's Constitutional Limitations (4th Ed.) pp. 760-5 54
12 Corpus Juris 980-1 54
XX Halsbury's Laws of England (2d Ed.) p. 602 47
2 Mechem on Agency (2nd Ed.) Sec. 1804, p. 1388 22
4 Moore Int. Law Dig. p. 636 21
Restatement, Contracts, §86 51
§91 ..... 12, 51
2 Wigmore on Evidence (2nd Ed.) §1061 11
1 Williston on Contracts, §181 11
1 Williston on Contracts (Rev. Ed. 1936) §169, p. 557 11
29 Yale L. J. 91 (1919) 54
35 Yale L. J. 478 (1926) 54

Statutes.

English Limitation Act, 1623, 21 Jac. 1, c. 16, §3 47
New York Civil Practice Act
§15 9
§59 51
§977-b 33, 54, 55
Rules of Decision Act, 28 U. S. C. §725, R. S. §721 ..... 29, 31, 32, 45, 46, 47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

No. 566.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

Scope of Respondent's Brief.

The respondent in its brief has not been content to rely upon the single ground upon which the Circuit Court of Appeals acted in reversing the judgment of the District Court which dismissed the complaint. That ground was the supposed exemption of the State of Russia from the New York statute of limitations. The two opinions of the Circuit Court of Appeals (R. 281-91) discuss nothing but this question and the language used by this Court in *United States* v. *Belmont*, 301 U. S. 324, cited in connection with this question.

But of the 97 pages of respondent's brief only 33 are devoted to this question (pp. 49-82) and only 8 to the claimed applicability of *United States* v. *Belmont* (pp. 90-7). A good half of respondent's brief in this Court is devoted to questions either here raised for the first time or decided against the respondent below. Respondent has omitted no opportunity

to insert in the text or by footnote every conceivable ground of objection to the judgment of dismissal, including one ground which was conceded below by the respondent.

In the reply to such an argument it becomes necessary to take up respondent's points in order and in detail.

Summary of Argument Herein.

On the supposed issues of fact, respondent makes a partial and misleading summary of the record. On the questions of law, respondent fundamentally errs in confusing with the question here present of the application to a foreign sovereign *plaintiff* of local procedural statutes, the quite unrelated problem of the immunity of the sovereign *as a defendant*. Respondent confuses the question of jurisdiction *in invitum* against a sovereign with the legal effect of the voluntary submission of his claim to the jurisdiction. Respondent also broadens unreasonably and without precedent the Federal power of foreign relations to the exclusion of existing State law.

I. As to respondent's attempt to create an issue of fact (brief, Part One pp. 12-31).

Respondent argues that the petitioner failed below to establish an unequivocal refusal to pay the deposit (brief, pp. 12-29) or at least that there is a conflict of evidence on the point which entitled respondent to a trial (brief, pp. 29-31).

In the effort to make this contention good, the respondent employs expressions which might lead this Court to believe that a complete summary of the record was being presented.[1] In fact the summary offered in respondent's brief is highly partial and misleading.

---

[1] For example "an evaluation of the meaning of all the circumstances disclosed even by this record" (p. 14), "an examination of the facts" (p. 15), "the record discloses nothing further * * * until * * *" (p. 25).

A. Petitioner's Repudiation.

The District Court regarded it as plain that actual, unequivocal repudiation of liability by the petitioner in respect of the deposit occurred as early as February 25, 1918 (R. 260), consisting of the application of the deposit by the petitioner on February 25, 1918, against the moneys which it claimed were owing to it by the State of Russia and of the approval of that action on March 14, 1918, by the Executive Committee of petitioner's Board of Directors (R. 259, 82-3). When respondent says that it "seriously" disputes the existence of the repudiation (as distinguished from communication thereof to the State of Russia), we cannot but believe this statement an inadvertence. The closing of the account of the Ministry of Finance, the transfer thereof to a new account, and the charging to such new account of petitioner's claims against the State of Russia in the amount of $9,000,000 with the effect of absorbing entirely the Ministry of Finance account—all this unquestionably constitutes as matter of law a repudiation of liability by the petitioner. Respondent's brief at page 19 seems to recognize the effect of these transactions.

Until the petitioner had made up its mind to appropriate the Ministry of Finance account in payment of its claims against Russia, its refusal to representatives of Russia with respect to the account was much less definite. Two attempts were made by those representatives to obtain the money before February 25, 1918. The respondent spends three pages of its brief (pp. 17-19) in describing those attempts, despite the fact that the District Court based none of its findings thereon (R. 260-4).

B. Respondent's Unfair Account of Notice of Repudiation.

In its account of the facts on the basis of which it asks this Court to find that there was no unequivocal notice of

repudiation, the respondent systematically leaves out of the discussion the facts which compelled the findings of the District Court as summarized at pages 8-9 of our main brief. The respondent omits mention of the testimony of the Russian Ambassador, Mr. Bakhmeteff, that he had many conferences in the office of the Under Secretary of State[1] where he was told that all his endeavors to get the deposit here involved proved to be futile and he could not get it; that Mr. Bakhmeteff was told that the petitioner refused to surrender the money; that Mr. Bakhmeteff knew of claims of the petitioner against the State of Russia; that he knew in a general way that the petitioner had made an offset on its books in payment of those claims against the Government account; and that this set-off was the reason for the petitioner's refusal to release the money (R. 54-6). The Ambassador testified:

> "I would say what I knew was this: That the reason, or all of the reason, why they refused to give this money was the fact that they made that offset."

The respondent omits mention of the affidavit of Conrad de Sahmen, who was prior to November 7, 1917 Director of the Chancery of Credit of the Russian Ministry of Finance (R. 97) and in whose department was the Foreign Section having direct jurisdiction over the account, at the time of its establishment, on behalf of the State of Russia (R. 229, 231). In this affidavit Mr. de Sahmen said (R. 100):

> "I met Mr. Boris Bakhmeteff on numerous occasions when he came to Paris for the Peace Conference early in 1919. Mr. Bakhmeteff and Mr. Ughet, in the course of their conversations with me, in and about 1919, said in substance that the Russian Embassy in the United States had demanded payment of the Ministry of Finance account with the Guaranty Trust Company of

[1] Frank L. Polk, since 1920 a member of this firm. Mr. Polk has had no part in the preparation of this case on behalf of the petitioner.

New York, and that the Guaranty Trust Company had refused to pay."

While mentioning in a footnote (brief, p. 22) the affidavit of Harold Stanley establishing a conversation in June, 1919, at which Mr. Ughet was told by the petitioner that the deposit would not be paid unless the State of Russia paid the petitioner what it owed them (R. 78), the respondent omits mention of the corroborating affidavit of Charles Sargent (R. 78-9). Mr. Sargent, who was present at the conference and who remembered it,[1] says, with reference to a statement at the conference that the Russian Government money with the petitioner should be used to pay $1,625,000 interest on the Russian Government loan payable July 10, 1919:

> "I recall that Mr. Stanley [Vice President of the petitioner] said in positive tones that Guaranty Trust Company would not make this money available. To the best of my recollection he said in substance that Guaranty Trust Company had a set-off against this money but I do not recall the details of what he said on that subject."

Again, while mentioning the interviews between petitioner's counsel and counsel for the Russian Government in June, 1919 and quoting from the correspondence which counsel for the Russian Government had with Mr. Ughet in that connection (brief, p. 23), the respondent ignores the very significant language of Mr. Ughet's letter to his counsel dated July 1, 1919 which respondent itself produced and filed (R. 140):

> "Mr. Russell [petitioner's counsel] in accordance with your letter, states that while the funds of the Guaranty Trust Company have been seized by the Bolsheviki bands, who, quite naturally are not recognized

[1] In this respect differing from Mr. Ughet who testified that he did not remember what took place at the conference (R. 40) but whose testimony is nevertheless used by respondent in the attempt to create a contradiction (brief, p. 23n).

by the United States, the Guaranty Trust Company is not releasing the funds of the Russian National Government * * *."

Also absent from respondent's brief is any reference to the letter which Mr. Bakhmeteff wrote to his counsel on September 12, 1921, referring to the deposit as money (R. 147)

> "which we some years ago so unsuccessfully endeavored to release";

and to the letter which Mr. Murray wrote to the Ambassador on September 23, 1921, describing a conference with petitioner's counsel (R. 149):

> "They both agreed, however, that they could not advise the Guaranty Trust Company to depart from the position heretofore taken by their own office and by the Trust Company. They found on an examination of the records that their office was of the opinion that the Trust Company should not part with the fund, especially as it appeared that it stands to lose more than the amount of the fund."

Inadequate reference is made by the respondent to the petitioner's letter to the Secretary of State dated December 9, 1921 in which it said (R. 109):

> "Shortly after coming into power the Soviet Government took over and merged into the government treasury all banks in Russia, thereby confiscating their property and all balances therein, including those in favor of this Trust Company, representing in value over $8,000,000. As soon as we learned of this seizure early in 1918, we, on advice of counsel, applied the deposit account of the Russian Government with us as a partial offset against the greater amount due to us by the Russian Government through seizure of our property, and when there is a Government in Russia recognized by the United States we shall press our claim for the balance due us, together with interest thereon."

This announcement, while made to the State Department, came to the notice of the assistant representative of the Ministry of Finance and Assistant Financial Attaché, Mr. Ter-Assatouroff (R. 72), and also to that of Mr. Ughet (R. 41).

Respondent's brief barely mentions the affidavit of Mr. Breton, a Vice-President of the petitioner, who testified to conversations with Mr. Ughet and Mr. Ter-Assatouroff in 1918 and 1919 in which he said that the petitioner would not pay the deposit because of its claims against Russia (R. 224-5). This testimony is confirmed by the affidavit of Mr. Ter-Assatouroff, who also described conversations with the petitioner's President to the same effect (R. 71-2).

C. Questions of Law Exclusively Raised by Respondent.

All the questions raised by respondent with reference to the testimony so inadequately summarized in its brief (pp. 12-29), are really questions of law. There is no real dispute as to what happened. The facts of repudiation appear in the papers submitted by the respondent as well as by the petitioner. Thus respondent produced the letter from the Federal Reserve Board official to the Treasury Department dated May 7, 1918 quoting petitioner's Vice-President, Mr. Breton, to the effect that the petitioner had consolidated its Russian accounts and thus disposed of the balance to the credit of the Russian Government (R. 200-1). This information was transmitted to the State Department (R. 201), through whom the Ambassador testified that he learned of petitioner's set-off (R. 55-6).

Respondent points to the fact that in its refusals to pay the deposit the petitioner constantly questioned the Ambassador's authority to draw on the account, and also gave possible double liability as a reason for declining to place the account at his disposal. The petitioner did assign these

reasons also. But it regularly accompanied them with a statement of its own claim upon the account, as abundantly appears from the evidence above summarized showing that the Ambassador and the Financial Attaché understood the non-payment to be due to the petitioner's claims. The Ambassador indeed considered that the petitioner's set-off was "all of the reason" for the refusal (R. 56). As a matter of law, therefore, the District Court properly concluded that the coupling with the refusal of other reasons or wrong reasons did not affect the finality of the repudiation (R. 266).[1]

Certain it is that petitioner's denial of the Ambassador's status with respect to the deposit, in no way misled him or his Financial Attaché. They clearly realized that the ground of petitioner's refusal was its own claim to the money. Moreover they realized, under the advice of their counsel, their full legal right to represent the State of Russia in this country and to sue for the account in its name (R. 113). Nevertheless they elected not to bring the requisite action (R. 146), after several conferences with the State Department (R. 177), which of course was fully cognizant of petitioner's set-off (R. 201).

In all this no possible question arises with respect to the unequivocal character of petitioner's repudiation of liability. *Tillman* v. *Guaranty Trust Company*, 253 N. Y. 295, cited by respondent as showing that the repudiation must

---

[1] The failure of the State of Russia to present authorized signatures in accordance with the list of signatures established in 1916 when demanding payment of the account, is immaterial. These signatures were those of officers of the Imperial Russian Government and of minor employees of the Foreign Section (R. 231). These officials and employees of course left the service at the time of the Soviet Revolution (R. 237-40, 270). The designation of authorized signatures was revocable (*Vladikavkazsky R. Co.* v. *New York Trust Co.*, 263 N. Y. 366, 375), and in no way affected the authority of the Ambassador and the Financial Attaché as representing the State of Russia in this country.

In addition it may be noted that Mr. Ughet and Mr. Ter-Assatouroff, who received notice of petitioner's refusal on several occasions, were both representatives of the Ministry of Finance in New York (R. 174-5, 70).

be unequivocal, was an action in which a complaint was likewise dismissed upon affidavits on the ground of the statute of limitations. The defendant's letter of repudiation was written on November 10, 1920, to the Deutsche Bank, Berlin, as agent for plaintiff's assignor. It stated that the claim of plaintiff's assignor for certain balances was not valid, and then added:

> "Complicated legal procedure is necessary to the debiting or crediting of these old accounts, and we would much prefer that any transactions of such a character be postponed until terms with the Russian Government have been settled."[1]

Yet the Court of Appeals had no doubt that Guaranty Trust Company's refusal in the *Tillman* case was unequivocal.

The cases cited by the respondent at pages 30-31 of its brief in support of the claim of a conflict of evidence, are all wide of the situation here presented. Those cases disclose an issue on material facts joined in the opposing affidavits. This case shows substantially no difference of fact, but only conflicting inferences of law from the facts.

D. Uncontradicted Evidence of Demand by the State of Russia.

Respondent's brief overlooks the evidence in the record, substantially undisputed, of a demand by the State of Russia for the deposit. Such a demand starts the running of the statute of limitations under New York Civil Practice Act §15.[2] A demand may be in any form. *Delehunty* v. *Central National Bank*, 37 App. Div. 434 (1899). Any intimation that a payment is desired is a sufficient demand. *Miller* v. *Davis*, 88 Me. 454 (1896); *In re Baltimore Pearl Hominy Co.*, 5 F. (2d) 553, 555 (C. C. A. 4, 1925).

---

[1] Papers on appeal in the Court of Appeals, folios 41-2.

[2] Petitioner's main brief, page 92.

Demands for payment of the deposit sufficient to start the running of limitations occurred on numerous occasions. They occurred when Mr. Ughet handed to petitioner the form letter to National City Bank, early in December 1917, and requested the petitioner to make the account in suit available for draft by the Ambassador in the same manner (R. 34); and when the Counsellor of the State Department, in the presence and with the evident approval of Mr. Ughet, early in 1918, asked the President of the petitioner to place the account at the disposal of the Ambassador (R. 14); and when Mr. Ughet and Mr. Ter-Assatouroff in their several interviews with officers of the petitioner made the same request (R. 72, 224); and when Mr. Ughet requested petitioner's Vice-President to make the account in suit available for the purpose of preventing a default on the Russian Government loan on June 18, 1919 (R. 77-8); and when the Protective Committee on July 3, 1919, at the request of Mr. Ughet as Chargé d'Affaires asked the defendant to remit to National City Bank for payment on the Russian Government loan $1,625,000 on account of interest (R. 101, 114).

E. Improper Reference by Respondent to Settlement Negotiations.

In this connection respondent refers (brief, p. 28) to letters which the petitioner and its counsel in 1933—1934, wrote to the President of Amtorg Trading Corporation expressing a willingness to arrive at a settlement with the Soviet Government of "mutual claims in connection with ruble and dollar current account balances of the Guaranty Trust Company on the one hand and the Russian Government and/or the former native Russian banks or bankers on the other hand" (R. 207, 208, 211-2). This was an offer of settlement of approximately $7,226,000 of claims against the petitioner (R. 82) by payment of $250,000 upon one condition being satisfied and a further $750,000 upon a second condition being satisfied. The offer referred to the Ministry of Finance

account as a "former" account (R. 211). It was never accepted and came to nothing.

The impropriety of the introduction into the record of such evidence, is evident. It contains no acknowledgment of indebtedness on the part of the petitioner, and shows merely a desire to buy peace.

> "The rule is well settled that no advantage can be taken of offers made by way of compromise; that a party may, with impunity, attempt to buy his peace."

Tennant v. *Dudley*, 144 N. Y. 504, 507 (1895), citing *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527, 548 (1876).[1]

The unaccepted offer of $1,000,000 in full settlement was less than the amount claimed, and is therefore incompetent either as an admission of liability or as a tolling of the statute of limitations.[2]

The cases cited by respondent (brief, p. 28n) have no bearing on the use of settlement negotiations as an acknowledgment of indebtedness, deal with conceded acknowledgments, and do not represent the present law of New York as to the requisites and effect of acknowledgment.[3] The law

---

[1] See also in accord:

Wemyss Furniture Co. v. *Strober*, 199 A. D. 449, 452 (1st Dept. N. Y. 1922) (offer of defendant to pay more than he subsequently admitted he owed);

Dougherty v. *National City Bank of New York*, 157 Misc. 849, 859, 861 (Sup. Ct. N. Y. 1935) (letters seeking compromise offered to show deposit relationship and acknowledgment);

Manhattan Top & Body Co. v. *White Co.*, 78 Misc. 401, 403 (App. Term N. Y. 1912) (defendant's offer to compromise by rescinding and paying small amount);

2 Wigmore on Evidence (2nd Ed.) Section 1061.

[2] *Union Bank* v. *Deshell*, 139 A. D. 217, 219 (2nd Dept. N. Y. 1910) (tender of check for less than amount claimed); *Heaton* v. *Leonard*, 69 Hun 423, 425 (3rd Dept. N. Y. 1893) (check for less amount tendered as compromise); *U. S.* v. *Wilder*, 13 Wall. 254 (1871) (part payment in full settlement); 1 Williston on Contracts, Section 181; 1 Williston on Contracts (Rev. Ed. 1936), Section 169, page 557.

[3] For the present law of New York on that subject see page 50 below.

is now well settled that where the promisor makes a conditional or hypothetical promise, the debt is not revived except upon the happening of the condition or upon the arrival of the time specified.[1]

F. Adequacy of Present Record.

It is plain on this record that, if a jury were impaneled in this Court, this Court would be obliged to direct a verdict for the petitioner in the absence of any substantial question of fact.

But in any event the present record is in many respects more satisfactory than any future record could be expected to be if the case were sent back for trial. The parties have submitted every available scrap of evidence on the accrual of a cause of action in favor of the State of Russia. At least 85 pages of the record comprise letters and affidavits submitted by the respondent, including statements by the Treasury and the State Department (R. 212-23). Of the four persons most active in connection with the attempt of the State of Russia to obtain the deposit, three are still living.[2] These are Mr. Bakhmeteff, the Ambassador; Mr. Ughet, the Financial Attaché and representative of the Ministry of Finance; and Mr. Ter-Assatouroff, the Assistant Financial Attaché and assistant representative of the Ministry of Finance. The testimony of all these three is represented in this record by examination and cross-examination upon oral questions and answers. The depositions of Mr. Bakhmeteff and Mr. Ughet were taken pursuant to court order (R. 6), and the respondent cross-examined them. Mr. Ter-

---

[1] Restatement, Contracts, Section 91; *Tebo* v. *Robinson*, 100 N. Y. 27 (1885) (promise to pay "when able"); *Wakeman* v. *Sherman*, 9 N. Y. 85 (1853) (promise to pay if business successful); *Francis* v. *Rycroft*, 148 A. D. 65, 67 (1st Dept. N. Y. 1911) (promise to pay as soon as estate is "settled").

[2] Charles H. Sabin, President of the petitioner, died October 10, 1933 (R. 83).

Assatouroff's direct examination consisted of an affidavit, but the United States cross-examined and filed the record as an affidavit (R. 151). By the terms of the order, the depositions cannot be received upon the trial of the action (R. 7).[1] As to their testimony, therefore, the only effect of sending the case back for trial would be to entail upon petitioner the risk of their dying or being incapacitated before their testimony could be given in court.

The petitioner has even now lost by death witnesses having knowledge of its repudiation of liability. John H. Fulton, Chairman of the Protective Committee which corresponded with Mr. Ughet in 1919, died on September 25, 1927 (R. 89). Charles H. Russell, petitioner's attorney who conferred with the Ambassador's attorney in 1919, died on February 19, 1921 (R. 84). John P. Murray, counsel to the Ambassador, died about 1930 (R. 85, 131).

The lapse of years since the events involved in the defense of limitations is already reflected in the inability of the witnesses to recall details (R. 40, 91, 235). It is not to be supposed that the recollections of Mr. Bakhmeteff and Mr. Ughet on events that occurred twenty years ago would be fresher upon a future trial than they were at the time of their depositions sworn to in September 1935 (R. 43, 68).

II. As to respondent's attempt to limit the authority of the Russian Ambassador and Financial Attaché accredited and recognized by it during the period 1917-33 (brief, pp. 31-49).

Respondent argues that, even if petitioner's repudiation of liability on the deposit was communicated to Mr. Bakhmeteff and Mr. Ughet more than six years before November 16, 1933, no legal effect flows therefrom because they were

[1] This restriction was required by the rule of *Ex parte Fisk*, 113 U. S. 713 (1885). See *Donnelly* v. *Anderson Brown & Co.*, 275 F. 438, 440 (D. C. S. D. N. Y. 1921).

not authorized representatives of the Soviet Government, the acts of the Soviet Government were retroactively validated by recognition, and their authority during the period 1917-33 was in some way limited. Any such contention is baseless.

A. The Retroactivity of Recognition Does Not Affect Notice Given to a Diplomatic Representative of Russia Recognized by the State Department at the Time.

In our main brief at pages 75-83, we pointed out that the judicially developed doctrine of retroactivity never has been and cannot be applied so as to invalidate acts done outside the foreign country by recognized and accredited representatives of the predecessor regime. The demonstration there made is in no way answered by respondent. Respondent cites the standard authorities on retroactivity of recognition (brief, pp. 32-3) without noticing the analysis made at page 77 of our main brief showing that the acts involved in each of those cases were acts of a newly recognized foreign government in its own country. The principle which validates such acts in the foreign country, cannot extend to *invalidate* acts of the predecessor government by its then recognized representatives in this country.

At all times prior to November 16, 1933, when they ceased to have recognition from the State Department, Mr. Ughet and Mr. Bakhmeteff were the full and unqualified representatives of the *de jure* sovereign of Russia, by virtue of their recognition as such by the State Department. Such recognition is conclusive upon the courts. As this Court said in *Jones* v. *United States*, 137 U. S. 202, 212 (1890), since frequently cited on the point:

> "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the

judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."[1]

The binding quality of the recognition accorded by the political department was recognized by the District Court with respect to Mr. Bakhmeteff and Mr. Ughet (R. 268-9) and also by the Circuit Court of Appeals (R. 282, 283, 91 F. [2d] at 899). The governing principles with respect to Mr. Bakhmeteff and Mr. Ughet as regards both their then status and the legal effect to be given their acts after they should have been displaced by recognition of the Soviet Government, were worked out in 1927 by the Circuit Court of Appeals for the Second Circuit in the *Lehigh Valley* case, 21 F(2d) 396, 400, certiorari denied 275 U. S. 571. It is meaningless to say of this decision, as the respondent does (brief, p. 32), that it is inapplicable because decided "on the basis of non-recognition of the Soviet Government." As is pointed out in our main brief at page 79, the Circuit Court of Appeals specifically dealt with the effect on the judgment of future recognition of the Soviet Government, and held that recognition would not invalidate retroactively acts performed outside Russia. The basis upon which that court's opinion proceeded was the distinction on which we rely between the state and the government representing it (petr.'s main brief, pp. 80-2).

The representative of the Soviet Government designated by it in the United States during the period or part of the period prior to November 16, 1933, Mr. Ludwig Martens (R. 190, 218), was denied by our courts any right or title with respect to property of the State of Russia, against the protest of Mr. Bakhmeteff and upon the certificate of the State Department. *The Rogdai* (D. C. Cal. 1920), 278 F. 294, 279 F. 130; *The Penza* (D. C. E. D. N. Y. 1921), 277 F. 91.

[1] See also cases there cited.

In the latter case Judge Manton cited as binding upon him a press release of the State Department issued May 6, 1921, as follows:

> "The Department of State has received numerous inquiries regarding Mr. L. A. Martens, claiming to be a representative of a Russian Socialist Federated Soviet Republic. The department feels it to be its duty to inform the public that Mr. Martens has not been received or recognized as the representative of the government of Russia, or of any other government. As the United States government has not recognized the Bolshevik regime at Moscow as a government, extreme caution should be exercised as to representations made by any one purporting to represent the Bolshevik government."

It seems to us the height of frivolity for the Government which made that statement to its nationals to contend in this Court that the petitioner's notice of repudiation of liability would have had to be given in 1918-20

> "at least to the designated representative of the Soviet Government in the United States, Mr. Ludwig Martens" (respt.'s brief, p. 33).

B. RESPONDENT'S EFFORT IN ITS BRIEF TO QUALIFY AND REPUDIATE THE STATUS DUE THE RUSSIAN AMBASSADOR AND FINANCIAL ATTACHÉ BY VIRTUE OF THE RECOGNITION ACCORDED THEM BY RESPONDENT PRIOR TO NOVEMBER 16, 1933, MUST FAIL.

In respondent's brief (pp. 33-46), we see the extraordinary spectacle of the Government which prior to November 16, 1933 accredited to its nationals Mr. Bakhmeteff and Mr. Ughet as the representatives of the State of Russia in this country, attempting now and for the purposes of a particular litigation to limit and to derogate from the authority due them in this Court by virtue of that recognition.

1. It is true that the State Department is not a party to this change of position. The letter of Secretary Hull dated

November 21, 1935 in all respects confirms the diplomatic powers of Mr. Bakhmeteff and Mr. Ughet to June 30, 1922 and November 16, 1933 respectively (R. 216-9). The Secretary of State presents to this Court the same certificate with reference to Mr. Ughet's recognition as Chargé d'Affaires (R. 186) which the District Court had before it in the *Lehigh Valley* case in 1919, 293 F. 133, 134.

At all times during the incumbency of Mr. Bakhmeteff and of Mr. Ughet the State Department certified their status respectively as Ambassador and as Financial Attaché, without limit or qualification. Examples are the certificate of Secretary Lansing dated October 31, 1918 with reference to Mr. Bakhmeteff, and that of Acting Secretary Polk dated July 2, 1919 with reference to Mr. Ughet in the *Lehigh Valley* case, 293 F. 133; the certificate of Secretary Lansing dated May 8, 1919 with reference to Mr. Bakhmeteff in *Agency of Canadian Car and Foundry Co.* v. *American Can Co.*, 258 F. 363, 368 (C. C. A. 2, 1919); the certificate of the State Department dated April 6, 1920 with reference to Mr. Bakhmeteff in *The Rogdai,* 278 F. 294, 295; the State Department's letter of June 24, 1919 referred to in *The Penza,* 277 F. 91, 93; the certificate of Secretary Hughes dated February 19, 1923 with respect to both Mr. Bakhmeteff and Mr. Ughet (R. 247); and the certificate of Acting Secretary Olds dated December 20, 1927 with respect to Mr. Ughet (R. 246). On the faith of the latter two certificates the courts ordered to be paid an aggregate of $984,104.62 (R. 243) by Lehigh Valley Railroad Company to Mr. Ughet on behalf of the State of Russia. Of this amount $764,554.89 came into the hands of the United States (respt.'s brief, p. 43).

2. Despite this general course of unqualified recognition and the broad powers which the law confers upon the diplomatic representatives of a foreign state, the respondent has attempted in its brief to dilute and qualify their status and their authority in view of their dealings with this petitioner. The positive and repeated recognition which the

State Department accorded to them in numerous certificates of their status is represented for the purposes of this action as (brief, p. 40)

> "a continuing restricted authority, based entirely on our Government's sufferance and consent."

Respondent prefers to say that our Government "did not deny" the status of the Ambassador and Financial Attaché (brief, pp. 34, 42). Their authority is referred to as "limited authority" (pp. 41, 42). It is implied that such authority extended only to matters which the United States "wished settled" (p. 43), and that they were in reality the puppets of American national interest serving particular and limited ends of our Government during the whole time when the Government held them out to American nationals and to the courts as the diplomatic representatives of a foreign sovereign.

We submit that the courts will not tolerate any such procedure. The rule of *Jones* v. *United States*, 137 U. S. 202, 212, quoted at page 14 above, which was followed in *Agency of Canadian Car and Foundry Co.* v. *American Can Co.*, 258 F. 363 (C. C. A. 2, 1919), and in the *Lehigh Valley* case, 21 F. (2d) 396, certiorari denied 275 U. S. 571, obliges the courts to accept the determination of the political department as to the sovereign of any foreign territory. That determination once made, as it was so definitely and frequently with respect to Russia, our courts will draw for themselves the full legal consequences of sovereignty and of the ambassadorial status. The political department informs the judiciary regarding the foreign governments with which it is in relation, but does not in any way control the judiciary with respect to the legal consequences. These are determined by the judicial process alone. It is useless for the respondent to try to spell out from a few of the instances in which the Ambassador and the Financial Attaché acted, limitations of law upon their authority. This record in fact

does not support any such limitations. In every respect the credit accorded by the State Department to Mr. Bakhmeteff and Mr. Ughet while they occupied their official positions on behalf of the State of Russia was full, complete and unqualified.

The courts so understood it. See *The Penza,* 277 F. 91 (D. C. E. D. N. Y. 1921), and *Lehigh Valley Railroad Co. v. State of Russia,* 293 F. 133 (D. C. S. D. N. Y. 1919), 293 F. 135 (D. C. S. D. N. Y. 1923) writ of prohibition denied 265 U. S. 573 (1924), affirmed 21 F. (2d) 396 (C. C. A. 2, 1927), writ of certiorari denied 275 U. S. 571 (1927). Nor is it in any way true that the courts considered the authority of the Ambassador or Financial Attaché flowing as a matter of law from the status conferred upon them by the recognition of the political department, to be circumscribed (as respondent now intimates, brief, pp. 40-2) to the purposes of specific law suits. In *State of Russia* v. *Bankers Trust Co.,* 4 F. Supp. 417 (D. C. S. D. N. Y. September 18, 1933),[1] Judge Coleman sustained the right of Mr. Ughet as Financial Attaché to sue a New York bank for $115,333.05 on the basis of an agreement which he had made with the defendant on behalf of the State of Russia, saying (p. 419):

> "The court is precluded from inquiring whether Ughet as Russian financial attache had actual authority from the plaintiff in making the agreement which the plaintiff alleges and in causing this suit to be brought, because of the express recognition of his authority by the political branch of the American government which has been certified to by the Secretary of State. Lehigh Valley R. R. Co. v. State of Russia (C. C. A.) 21 F. (2d) 396. Notwithstanding the differences in the facts,

[1] Affirmed (after the substitution of the United States as assignee under the Litvinov assignment, 69 F. [2d] 44) in 83 F. (2d) 236, where the Circuit Court of Appeals acted on the principle that the claim of a foreign sovereign, when put in litigation in a municipal court, must be judged in every way like that of a private litigant. This Court denied certiorari, 299 U. S. 563 (1937).

the principles of that decision are clearly controlling in this."

3. So clear are the powers of Mr. Bakhmeteff and Mr. Ughet as representatives of the State of Russia for the period 1917-33 that the respondent is without excuse, we submit, in questioning or appearing to question their right to sue for the Ministry of Finance account with the petitioner. Respondent refers to "the doctrine, supported by considerable authority, that an ambassador may not sue without the express consent of his government" (brief, p. 46). Any such contention approaches the frivolous. The case of *Baron Penedo* v. *Johnson*, 29 L. T. 452 (1873) from which a sentence is quoted[1] appearing to support this contention, in reality decided only that a foreign minister suing on behalf of his sovereign cannot sue in his own name.[2] *Colombian Government* v. *Rothschild*, 1 Sim. 94 (1826), decided that a foreign sovereign could not sue in the name of the foreign state alone, but must sue in the names of public officers who can be subjected to a cross-bill. 1 Sim. at 104. The dictum of the Attorney General which respondent cites to this Court as law (brief, p. 46) referred only to the principle above mentioned that the ambassador may not sue on behalf of his sovereign in his personal name. And even more patently irrelevant is the group of cases and authorities which respondent tenders at page 46 of its brief for the rule that an ambassador may not submit himself or his nation to the jurisdiction of a foreign court without the express author-

---

[1] The quotation is slightly varied from the language of the report.

[2] Defendants demurred

> "on the ground that the money lent to the Prince and Princess being the property of the Emperor of Brazil, the bill ought to have been filed in his own name, and not in that of his minister."

To the same effect see *Schneider* v. *Lizardi* (1846) 9 Beav. 461, 466; *Hullett* v. *King of Spain* (1828) 2 Bligh N. S. 31, 54-5 (dictum); *Don Diego de Acuna* v. *Bingley* (cir. 1616) Hob. 78, 113. It is manifest that this principle has nothing to do with the one under discussion.

ization of his government.[1] These authorities relate to the waiver of immunity as a defense by the foreign state through its ambassador.

As to the general and unlimited authority of an ambassador to bring action on behalf of his state, according to public international law as interpreted by our courts, there is no room for doubt. See the language of Story, J. in *The Anne* (1818) 3 Wheat. 435, 446; *Suarez* v. *Suarez* [1918] 1 Ch. 176, 191; *Republic of Mexico* v. *De Arangoiz* (1856) 5 Duer (12 N. Y. Super.) 634, 643, 646; instruction of State Department to American Minister at Vienna in 1874, 4 Moore Int. Law Dig. p. 636; Mayer D. J. in *State of Russia* v. *Lehigh Valley R. Co.*, 293 F. 133, 135; *Compania Española de Navagicion Maritima S. A.* v. *S. S. Navemar*, No. 242 October Term 1937, decided January 31, 1938. The principle established by these authorities with reference to Mr. Bakhmeteff's power to sue for the account here involved, was clearly stated by the Ambassador's counsel to petitioner's counsel in 1919, as follows (R. 113):

> "In reply to enquiry, Mr. Murray of Coudert Brothers says that in his opinion the Ambassador is the Russian Government, and has the right to direct the Guaranty what to do with the Russian Government deposit; that, as held in the Lehigh Valley case, the Ambassador can institute an action against the Guaranty in the name of the Russian Government; that, under the opinion in the Can case, there can be no defense to a demand by the Ambassador; that we cannot go back of his authority as Ambassador, as shown by the State Department certificate; that in the case of a judgment against the Guaranty, it could pay by cheque to the order of the Russian Government, delivered to the attorneys for the Russian Government."

Petitioner's counsel did not seriously dispute this statement of the law (R. 137). Indeed he could not do so.

---

[1] *Dickinson* v. *Del Solar* [1930] 1 K. B. 376; *Suarez* v. *Suarez* [1918] 1 Ch. 176; and similar authorities are given for this proposition.

4. The *actual* authority of the Ambassador over the account in suit is clear upon this record. Respondent's brief disproportionately emphasizes (pp. 18, 19, 22, 23, 24, 25, 26, 32n, 41, 45) the petitioner's denial of any power in the Ambassador with respect to the account. The petitioner's views on the subject are quite immaterial, it being clear upon this record that they in no way misled the Ambassador or his counsel as to his rights (R. 113). What is material is the authority with which the Ambassador is clothed as matter of law (pp. 19-23 above) and the power expressly given him by his government. As to his express authority, we have the affidavit of the Director of the Credit Chancery, Conrad de Sahmen, answering the question which the United States put to him (R. 99):

> "(6) Question. Did Mr. Boris Bakhmeteff, as Russian Ambassador, have the right to draw against this deposit account, and if so, under what conditions?
>
> Answer. Mr. Boris Bakhmeteff was vested with extraordinary powers. He was the only Ambassador who held authority to dispose at his discretion of all accounts of the Russian Ministry of Finance (including those of the Section Etrangere). There were no conditions to this power. He held the same rights as the Minister of Finance."[1]

Mr. de Sahmen, as has been mentioned (p. 4 above), was in charge of the department of the Imperial Russian Government Ministry of Finance to which was originally

---

[1] Respondent points to the statement of Mr. Ter-Asatouroff (R. 153-4, 157) that Mr. Bakmeteff had no authority to withdraw funds. It appears, however, that Mr. Ter-Asatouroff had in mind the established signatures and meant only that Mr. Bakhmeteff's was not one of them; see at R. 153, 231. Before his visit to America in January 1917, Mr. Ter-Asatouroff was frequently sent abroad on official missions (R. 69), and cannot have had means of knowledge regarding the Ambassador's authority over the account at all comparable with the knowledge of the Director of the Credit Chancery. Further it appears that Mr. Ter-Asatouroff was averse to the Embassy's policy of using the funds in National City Bank and Guaranty Trust Company (R. 157).

given immediate control over the account. His testimony on the question of the Ambassador's actual authority, is of the highest probative value. It is not mentioned in the brief of the respondent.[1]

Respondent seeks to contrast with the account in suit the accounts of the Russian Government with the National City Bank of New York, upon which, respondent says (brief, p. 36),

"Bakhmeteff was expressly authorized to draw."

This statement is incorrect. The language of the State Department cited therefor (R. 213) is that Mr. Bakhmeteff "was authorized to draw" against the balances with National City Bank, not that he was "expressly" authorized. And the State Department in connection with the Ambassador's authority predicated it upon his original appointment and his recognition by the United States (R. 213). In fact it does not appear that with respect to the accounts with National City Bank Mr. Bakhmeteff had any other or different authority than he had with respect to petitioner's Ministry of Finance account.[2] *That account was under the same name and established under the same conditions as the Russian Government account with National City Bank* (R. 248-9). At the opening of the account in suit, on July 18, 1916, the petitioner cabled the Chancery of Credit of the Imperial Russian Government at Petrograd (R. 227)

> "On July Tenth value July Eleventh we opened credit of Twenty-Five Million Dollars in name of Section Etrangere du Minister des Finances de Russie on the same terms as the same account at National City Bank."

The list of signatures originally established for drawing on the account was received by the petitioner from National

---

[1] Nor was Mr. de Sahmen's affidavit, though solicited by the United States (R. 97, 99), submitted by it to the District Court.

[2] Mr. Ter-Asatouroff was equally averse to the Embassy's policy of using the funds in both banks (R. 157).

City Bank (R. 228) as the persons authorized to draw against the account of similar name on the books of that bank (R. 248-9). Among the moneys handled by Mr. Ughet on behalf of the State of Russia in the accounts with National City Bank was an account entitled Section Etrangere du Ministere des Finances No. 2. The balance from this account, after payment of the obligations of the Russian Government, went to the United States as a creditor of Russia (R. 180-1, 177). The sums involved in the transactions of the Ambassador and the Financial Attaché through the accounts with National City Bank amounted to millions of dollars.[1] Out of these accounts, handled with its approval by the Russian Ambassador in the name of his sovereign, the United States itself benefited as a creditor of Russia.

The reversal of position which the United States would have this Court sanction, threatens the finality of these transactions, some of which went through an account bearing the same title as the account with petitioner. No distinction can be drawn between the acts of Mr. Bakhmeteff and Mr. Ughet with the petitioner, which the respondent seeks to repudiate by an attack on their authority and through the doctrine of retroactivity; and the acts of payment and settlement had in the National City Bank situation with the approval of the United States.

5. The record, as has been shown, demonstrates the incorrectness of the statement in respondent's brief (p. 44) that the account with petitioner was not within the scope of the matters concerning which our Government permitted Mr. Bakhmeteff and Mr. Ughet to continue to act. So far was

---

[1] From a letter written by the Secretary of the Treasury to the Secretary of State on June 2, 1922, and based upon information furnished by representatives of Russia, it appears that a total of $76,000,000 went through a liquidation account of the Ambassador with National City Bank. Disbursements from it were made for supplies, transportation, storage, inspection, interest on United States Government and on private loans, salaries and upkeep of the Russian Embassy and consulates in the United States, and various miscellaneous purposes. Combined Annual Reports of the World War Foreign Debt Commission, 1922-6, page 86.

this from being the fact, according to the knowledge of respondent itself, that in connection with its acquisition of Russian assets in this country in 1933, *the respondent took from Mr. Ughet an assignment of the account in suit.* This assignment was executed by Mr. Ughet on behalf of the State of Russia as Russian Financial Attaché and custodian of the property of the Russian Government in the United States on August 25, 1933 (R. 254-6). Among the items so assigned by Mr. Ughet to the United States, was the following (R. 255):

> "(1) Claim for approximately $4,976,722.78 with interest for a balance of the Russian Government with the Guaranty Trust Company of New York."

C. Respondent's Attempt to Alter the Record After Judgment, Should be Denied.

Respondent argues (brief, pp. 39 ff.) that the acts done by American nationals relating to property of Russia in this country, which are expressly saved from question by the Litvinoff assignment, comprise only such acts as were done "with the approval of and under the control of our Government." We have already shown in our main brief (pp. 82-3) that the Litvinoff assignment is not to be so interpreted. *State of Russia* v. *National City Bank*, 69 F. (2d) 44, 48 (C. C. A. 2, 1934). In an effort to change the record in this respect, the respondent has caused to be written by one executive department to another, and has inserted in its brief in this Court, a letter dated June 18, 1937.[1] This letter is

[1] Appendix to respondent's brief, page 106. No date appears on the letter as reprinted by respondent. No date is given for it in respondent's brief. The letter was furnished to the Circuit Court of Appeals by the United States Attorney with a letter to the Court dated June 22, 1937 (i.e. just two weeks after the argument). In his letter of June 22, 1937, the United States Attorney said: "There is enclosed for your information a photostatic and three typewritten copies of a letter dated June 18, 1937, addressed by the Secretary of State to the Attorney General. This letter only came to my attention today."

written by the State Department to the Department of Justice. In the portion thereof quoted at page 40 of respondent's brief, the letter states what the Soviet Government "is understood to have agreed" in the Litvinoff assignment.

It will not escape notice that, by what must be an inadvertence, the writer of the letter of June 18, 1937, has omitted from the scope of the protection which the Litvinoff letter expressly afforded to perfected transactions in the United States acts done by nationals of the United States relating to property of a government of Russia; that is, *acts done by the petitioner*. This omission clearly appears from a comparison of subdivision (b) of Mr. Litvinoff's letter (respt.'s brief, p. 101), as accepted by the President (p. 103), with the State Department's interpretation (p. 107).

We cannot think that such an employment of the governmental prerogative to affect the result of litigation with one of its nationals, will have the approval of this Court. The petitioner obtained final judgment against the United States on November 6, 1936 (R. 276). The appeal was argued in the Circuit Court of Appeals on June 8, 1937. The letter sought to be added to the record was not written until June 18, 1937. We protested against its receipt by the Circuit Court of Appeals, and we protest against the receipt or use of it in this Court and ask that it be excluded from consideration. The true meaning and effect of the Litvinoff assignment is a matter for judicial construction and should not be influenced by *ex parte* and unilateral declarations by one of the parties in interest. Compare *Fourteen Diamond Rings* v. *United States* (1901), 183 U. S. 176, 180; *Union of Soviet Socialist Republics* v. *National City Bank*, Special Term Part III, New York County, February 15, 1938.[1]

---

[1] Reported in the New York Law Journal for February 15, 1938. In this action by the Soviet Government seeking to reach an alleged deposit with National City Bank, the plaintiff tendered a letter of the Soviet Ambassador purporting to interpret the Litvinoff assignment. Mr. Justice McCook said: "The court must make its own interpretation and, upon the basis of the documents submitted, finds that the claim in question was included among those released, and has become forever barred."

D. The Test of the Running of Limitations Is the Right of the State of Russia to Sue, Not the Right of the Soviet Government to Sue.

Respondent's argument that the statute of limitations could not begin to operate in favor of the petitioner because the Soviet Government was disabled to sue in our courts (brief, pp. 47-9), is founded upon the obvious fallacy that the Soviet Government was owner of the deposit (brief, p. 31). Respondent's brief ignores *The Sapphire* (1870) 11 Wall. 164, which is the classic statement of the principle that the real owner of the property of a sovereign is the state itself, and that the government is but the agency or representative of the national sovereignty. This principle is expressly applied to the status of Mr. Bakhmeteff and Mr. Ughet in the opinion of the Circuit Court of Appeals for the Second Circuit in *Lehigh Valley Railroad Co.* v. *State of Russia*, 21 F. (2d) at 400, citing also *State of Texas* v. *White* (1868) 7 Wall. 700, *Cherokee Nation* v. *Georgia* (1831) 5 Pet. 1, 52, and *The Rogdai* (D. C. Cal. 1920) 278 F. 294.

The vital distinction between the foreign state and its government, as regards claims in this country to state property, is clear and is thoroughly established. The application of that distinction to the situation of the Provisional Russian Government as the agent of the State of Russia in this country until November 16, 1933 to the exclusion of the Soviet Government, was stated in our main brief at pages 80-1. To that statement no answer is attempted by the respondent. Its contention based on the inability of the Soviet Government to sue, during the time when the Provisional Government in the persons of Mr. Bakhmeteff and Mr. Ughet were alone entitled to sue for the State of Russia in this country, is unfounded. The accrual of the cause of action and the running of limitations in this case are predicated upon the right to sue of the State of Russia as represented by the Provisional Government, not as represented by the unrecognized Soviet Government.

If the unrecognized Soviet Government could be assimilated to the position of a *cestui que trust* disabled from suing, the existence of the Provisional Government through our diplomatic recognition as a trustee with power to sue, caused the statute of limitations to run against the Soviet Government also. See *Meeks* v. *Olpherts* (1879), 100 U. S. 564, 569; *Dowell* v. *U. S.* 86 F. (2d) 120, 122 (C. C. A. 5, 1936). The same rule applies to agents with the power to sue. In 2 Mechem on Agency (2nd Ed.) Sec. 1804, page 1388, it is said:

> "So where an agent had sufficient authority to institute an action based on his own knowledge, the principal was held to have notice of all the facts under which the agent acted."

The agent in this case was the Provisional Government, the principal the State of Russia.[1]

III. As to the claimed exemption of foreign sovereigns from state statutes of limitations (Respt.'s brief, Part Two, pp. 48-82).

Respondent devotes to this point, which was the sole ground of reversal in the Circuit Court of Appeals, one-third of its brief. The primary fallacy here is the refusal to recognize that the main-spring of the rule *nullum tempus occurrit regi*, as applied by our courts, is the public interest of the local sovereign, and that the absence of any interest of the *local* sovereign in the affairs of a *foreign* sovereign prevents

---

[1] When on November 16, 1933, the Soviet Government, by virtue of its recognition by the United States, succeeded the Provisional Government as agent, trustee or representative of the Russian State in this country, it no less than its principal the State of Russia, was bound by and compelled to adopt as its own the acts of the former Government with reference to Russian property in this country. *United States* v. *Prioleau*, 2 H. & M. 558, 568 (1869); *United States* v. *McRae*, L. R. 7 Eq. 69, 75 (1869); *Voevodine* v. *Government of the Commander-in-Chief of the Armed Forces in the South of Russia*, 232 App. Div. (N. Y.) 204, 209 (1931).

extension of the privilege to foreign sovereigns. *French Republic* v. *Saratoga Vichy Spring Co.* (1903) 191 U. S. 427, 437. Respondent confuses the clearly-marked function and purpose of the rule *nullum tempus*, which limit its benefits to the local sovereign, with the unrelated principle of sovereign immunity.

A. The Rules of Decision Act Authorizes the Application of State Laws to Foreign Sovereigns Exactly as to Private Litigants.

In arguing that the Rules of Decision Act does not permit the application of state statutes of limitations to foreign sovereigns (brief, pp. 50-3, 83) the respondent concededly raises a point not raised in or considered by the courts below, and it may be doubted whether this Court will entertain it. *Zellerbach Paper Co.* v. *Helvering* (1934) 293 U. S. 172, 182.

In any event, the argument from the Rules of Decision Act[1] and from *U. S.* v. *Thompson* (1878) 98 U. S. 486, is a *non sequitur*. Upon analysis of Mr. Justice Swayne's opinion, which cites the classic authorities on the rule *nullum tempus*, it is perfectly clear that the ground of his decision was the exemption of the enacting sovereign from the laws of Parliament or of Congress, as set forth in the *Magdalen College* case (1616) 11 Co. Rep. 66b, 74b and in *U. S.* v. *Hoar*, Fed. Cas. No. 15,373 (1821) at p. 330.[2] The restriction of this principle to the enacting sovereign is well established. *U. S.* v. *California* (1936) 297 U. S. 175, 186, where indeed the United States contended for such a construction (page 178).

It is true that the Court also gives other reasons for its conclusion. It says that the exemption of the United States

---

[1] 28 U. S. Code, Section 725, R. S. Section 721, our main brief, page 92.

[2] Mr. Justice Story said:

"It appears to me * * * to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them (98 U. S. at 490). This statement is accurate. The exemption of the local sovereign from its own enactments (or those of the States subordinated to it by the Constitution) rests upon considerations of power, as Mr. Justice Holmes pointed out in *Kawananakoa* v. *Polyblank* (1907), 205 U. S. 349, 353, quoted at pages 61-2 of our main brief. Mr. Justice Swayne also said that, if the States can pass statutes of limitation binding upon the Federal government, they can by like means make it suable within their respective jurisdictions (98 U. S. at 490). This statement also rests upon considerations of power, i.e. the doctrine that the sovereign is omnipotent and that action against it without its consent is a logical impossibility.

The error of the respondent consists in attempting to extend these propositions. It consists in arguing that they apply equally to foreign sovereigns (brief, p. 52). This is not the case. So far as concerns considerations of power, either the States or the Federal government could authorize action against foreign sovereigns to the extent that they or their property are within the jurisdiction. The immunity of foreign sovereigns is predicated, not upon considerations of power, but upon considerations of expediency and of implied good faith between nation and nation. *The Exchange* (1812) 7 Cranch 116, quoted by respondent at pages 69-70. Chief Justice Marshall expressly points out (7 Cranch at 146) that the sovereign of the place has the power to impose its jurisdiction upon the visiting foreign sovereign.

Hence respondent is guilty of a false syllogism in seeking to extend to foreign sovereigns the language and the decisions of this Court in *U. S.* v. *Thompson*, 98 U. S. 486 and like cases. There is no parity between the domestic sovereign in his own territory and foreign sovereigns visiting there, as is abundantly shown by the instances of discrimination between them given in our main brief (pp. 58-60).

If we had taken over from English precedent the prerogative of fish royal, which Bracton treats in the same paragraph with the privilege of *nullum tempus* (our main brief, p. 14), it would not be claimed that the King of England, upon visiting our shores, could have our whales.

So with the argument *ab inconvenienti* (respt.'s brief, pp. 52, 63, 116-7). That argument is predicated by *U. S.* v. *Thompson*, 98 U. S. 486, 491, upon "the constitutional relations of the head and the members". An argument drawn from the relations of the Federal government to the State governments, all sharing the domestic sovereignty, cannot be extended to the relations of the Federal government with foreign sovereigns, even though the Federal government has exclusive control of foreign relations.[1] Our jurisprudence when the rights of our nationals are in question, is not affected by arguments *ab inconvenienti* directed to the interests of foreign sovereigns. The "public rights, revenue, and property" of which Mr. Justice Story spoke in *U. S.* v. *Hoar* (respt.'s brief, p. 53) are quite obviously the rights, revenue and property of the local sovereign only.

The general principle is thoroughly established that a foreign sovereign resorting to a municipal forum is bound by its canons of justice and rules of procedure. No reason appears why the rules so applied to him should not include the statute of limitations, i.e. the requirement that, if he desires the remedies of the forum, he must invoke them while the evidence is fresh. Manifestly, it seems to us, the Rules of Decision Act contemplates the application of State laws in such cases. Neither the Constitution nor any treaty or statute of the United States otherwise requires or provides. The fact that the States are prohibited from acting or interfering with foreign relations has no bearing. It is patent

[1] The impossibility of respondent's contentions on this point is perhaps most graphically shown by substituting the word "Russia" wherever the words "United States" appear in Mr. Justice Swayne's opinion in *United States* v. *Thompson*.

that the regulation by States of their own rules of procedure and the requirement that foreign states resorting to their courts accept such rules on a plane with private litigants, are not an interference with foreign relations. The opinion in *U. S.* v. *Curtiss-Wright Corporation*, 299 U. S. 304, 318 (1936), makes clear that the foreign relations of which the Federal government has exclusive cognizance are foreign relations in the strict or political sense of the term; i.e. the conduct of external affairs on behalf of the whole nation, as by the acquisition of territory, the making of international agreements, and the like. The Federal power over external affairs is in origin and essential character different from that over internal affairs. 299 U. S. at 319. Considerations applicable to the conduct of international relations cannot, therefore, be extended into the forum which the State of New York maintains for the adjudication of controversies that may be brought there, by foreign sovereigns or others.[1]

In *U. S.* v. *Nashville etc. R. Co.*, 118 U. S. 120, which involved the operation of a State statute of limitations upon bond coupons acquired by the United States under a treaty with the Chickasaw Indians, the bar of limitations did not arise because the period had not run when the United States acquired the coupons. From the opinion it is clear, however, that this Court saw no conflict between the treaty and the State statute, and would have applied the statute under the Rules of Decision Act if the period had run.

---

[1] The cases cited by respondent themselves make this point clear. In *Henderson* v. *Mayor of New York* (1875), 92 U. S. 259, which involved a statute of New York regulating foreign shipping, the Court at page 273 pointed out that the statute

> "belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments."

U. S. v. *Rauscher* (1886), 119 U. S. 407, dealt with the international rendition of fugitives, as to which the Court said at page 414

> "that it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers."

To attempt to subsume the statute of limitations and other procedural rules of the state when applied to a foreign sovereign plaintiff, under the rule applicable to taxes on foreign commerce and the negotiation of extradition treaties, is to lose sight of the whole issue in this case.

B. The New York Statute of Limitations Binds Foreign Sovereigns.

It is true that the New York statute does not in terms mention foreign sovereigns. The argument from that fact that foreign sovereigns are therefore exempted from the terms of the statute is, as we have shown, a wholly unjustified extension of the principle that the *enacting* sovereign is exempt from the application of his own statutes. Even the enacting sovereign has sometimes been bound by his statutes although not named. *U. S.* v. *Knight*, 14 Pet. 301 (1840); *Fink* v. *O'Neil*, 106 U. S. 272 (1882); *U. S.* v. *Harpootlian*, 24 F. (2d) 646 (C. C. A. 2, 1928).

The argument that, because among the sovereigns not named in the New York statute is the United States, and the United States is exempt from limitations, therefore foreign sovereigns not named in the statute are also exempt (respt.'s brief, p. 58) has been shown to be a *non sequitur*. Foreign sovereigns are not named in the New York statute providing for security for costs, yet are bound thereby. *Republic of Honduras* v. *Soto* (1889), 112 N. Y. 310. They are not named in the Federal Equity rules relating to counterclaims, yet are bound thereby. *U. S.* v. *National City Bank*, 83 F. (2d) 236 (C. C. A. 2, 1936), certiorari denied 299 U. S. 563.

Respondent cites New York Civil Practice Act §977-b (brief, p. 55) in disregard of the fact that, in so far as it applies to nationalized former Russian corporations, this section is an interference with the title to their property which on respondent's theory was three years previously as-

signed to the United States by the Soviet Government.[1] In *Tillman* v. *National City Bank and Guaranty Trust Company*, 276 N. Y. , decided January 11, 1938, the validity of subdivision 18 in so far as it sought to extend the statute of limitations in respect of a debt already barred, was challenged by defendant-respondent. The Court of Appeals gave judgment for defendant-respondent, but without opinion.

In discussing the reason of the rule *nullum tempus*, respondent goes so far as to argue that that reason applies equally to local and foreign sovereigns (brief, pp. 61-3), although conceding that the modern basis of the rule, which gives it vitality at present, is the public policy that public rights or interests shall not be lost or diminished by the failure of officials to assert them properly (respt.'s brief, p. 61). Respondent's discussion of this subject turns on an ambiguous use of the word "public". It is perfectly apparent from the evolution of the *nullum tempus* rule (petr.'s brief, pp. 14-23) that every court which has exempted the local sovereign from limitations out of consideration to the public interests, meant thereby the interests of the local sovereign. The interests of the local sovereign are the only "public" interests which concern any particular forum.

This distinction appears, among other things, from the language of this Court in *French Republic* v. *Saratoga Vichy Spring Co.*, (1903) 191 U. S. 427, 437; of the Supreme Court of Appeals of West Virginia in *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 329 (1887); and of Circuit Judge

---

[1] This statute was approved June 8, 1936. Subdivision 1 gives the general scope of the provision: "1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business, whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise."

Barr in *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 F. 533, 536 (1891). The respondent's attempted distinction of that class of cases (brief, pp. 73-5) leaves intact the striking fact that the courts, in discussing the right of a foreign sovereign to exemption from limitations, do not treat such right as *a local public interest* but reduce it to the footing of a private claim. The West Virginia Court, in denying the State of Virginia the benefits of *nullum tempus*, applies exactly the reasoning of this Court in denying the the State of Georgia exemption from Tennessee's exercise of eminent domain. *Georgia* v. *Chattanooga* (1924), 264 U. S. 472, 480; *State of Pennsylvania* v. *Wheeling Bridge Co.* (1851) 13 How. 518, 561.

The contention that because all governments are so conducted that the exemption from the statute of limitations is most useful and necessary in the protection of public rights (respt.'s brief, pp. 61, 62), the local sovereign must therefore admit foreign sovereigns to the benefit of such a policy, both begs the question and disregards the rationale of the exemption itself. Respondent seems to concede that the dictum "applicable to all governments alike" (brief, p. 62) is, as we have shown (petr.'s brief, pp. 28-32), merely justification for translating to a republican system part of the royal prerogative. The suggestion (brief, p. 62) that the United States, if it desires not to be barred in suits in foreign courts, should apply a uniform rule to the same effect in favor of foreign sovereigns, signally overlooks the fact that, so far as research goes, all foreign countries would subject the United States to the status of a private litigant with respect to limitations or other matters. See Appendix II to petitioner's brief, pages 96-116, particularly the responses of the Belgian Minister of Justice and the law faculty of the University of Berlin in the *Zappa* case (pp. 98, 107); *Dame de Latude* v. *S. S. Leon XIII* (p. 106); and *Inscription de bienes raices del Gobierno de Bolivia* (p. 100).

It is fatal to respondent's argument upon a desired equality of states in respect to this exemption, that such an ex-

emption would apparently be accorded to the United States as plaintiff in no other country. Respondent contests our interpretation of foreign law on this point (brief, pp. 76-8, Appendix, pp. 108-15). In order not to over-extend the argument, we shall deal only with the two countries as to which respondent specifies. *First*, as to the *Aguado* case. Respondent calls to our attention the fact that the case went to the Court of Cassation and that that Court rejected the claim of immunity of the Spanish Government from limitations on the ground that it was there asserted for the first time. The report shows that the Spanish Government claimed "that the Spanish law alone should regulate the duration of a right of action belonging to the state." As to this the editor of the reports (Journal du Palais, 1869, p. 118), says: "But it seems to us that this argument could not apply in our situation where there was involved, not a foreign government sued by a Frenchman, but rather a Frenchman sued by a foreign government: in the latter case, the jurisdiction of the French courts appears not to be doubtful under the terms of Code Napoleon, Article 15. See Demangeat, *Traité de Droit International* Vol. 1, page 420, Bonfils, *De la Competence des tribunaux francais,* n. 131." Moreover the Court of Cassation pointed out that the Spanish Government did not claim that under Spanish law "the period of prescription was greater than that under French law". In fact the extreme limit of prescription at the time of the decision under Spanish law for that type of action, was twenty years. *Novisima Recopilacion,* Book XI, Tit. 8 Law 5, enacted in 1805. The claim in the *Aguado* case was hence barred under Spanish law, just as the claim of the State of Russia here was barred both under the ten-year limitation of Imperial Russian law (petr.'s main brief, p. 111) and under the three-year limitation of Soviet Russian law (petr.'s main brief, p. 112) by the running of more than thirteen years between petitioner's repudiation in 1918-20 and the assignment to the United States in 1933.

Second, the respondent disputes our interpretation of Soviet law with respect to the operation of extinctive prescription (limitations) against the state. It being admitted (respt.'s brief, p. 111) that the Soviet statute runs against a claim of the Soviet Government when it acts in a proprietary capacity, the conclusion is obvious that a suit of the United States in Russia to recover a bank deposit would be held to be a suit in a proprietary capacity subject to limitations. See among the many authorities elsewhere cited by us *King of Spain* v. *Hullett*, 7 Bligh N. S. 359, 392; *Georgia* v. *Chattanooga*, 264 U. S. 472.

Third, the argument of the Spanish Government in the *Aguado* case suggests the possibility that in an action in a foreign court the United States might claim to be entitled to the benefits of its own law with respect to limitations, including the benefits of the rule *nullum tempus*. *Smith* v. *Weguelin* (1869) L. R. 8 Eq. 198. Over and above the universal line of authority which would be invoked to rebut any such claim, it may be noted that the doctrine of *Smith* v. *Weguelin* has been sharply restricted if not overruled. *Rex* v. *International Trustee for the Protection of Bondholders* [1937] A. C. 500, 530-1.

In view of the fact that the rule *nullum tempus* is so universally put upon the ground of public policy, an acid test of respondent's theory would be whether the specifically public and governmental rights of a state can be enforced in the courts of another. Some of them, such as the right to state property, can be so enforced as a matter of comity or favor. Others relating to the exercise of functions more especially governmental, cannot be enforced in the courts of foreign countries. Into this class fall tax and penal laws, which cannot be given extra-territorial effect. The consideration which is decisive on the question whether a law is a penal law in the international sense so that it cannot be en-

forced in the courts of another state, is whether its purpose is to punish an offense against the public justice of the state. *Huntington* v. *Attrill* (1892) 146 U. S. 657, 673-4; *Huntington* v. *Attrill* [1893] A. C. 150, 157.

The fact that the ascertainment of a foreign public interest in a statute prevents it from enforcement here is a final conclusive indication that the public policy basis of the rule *nullum tempus* is strictly territorial in its extent.[1]

C. Respondent's Dilemma Between an Inequitable Rule and Applying the Doctrine of Laches to Foreign Sovereigns.

The monstrous possibility opened by the decision of the Circuit Court of Appeals that foreign sovereigns may sue American nationals in respect of all their transactions, without limitation of time, is certainly not in the interest of a sound public policy. It is not agreeable, even in jest, to contemplate an action by the King of England to replevy from some New England museum powder horns negligently left by the servants of his royal ancestor on the field of Bunker Hill. Respondent realizes that there must be some restriction in the matter of time upon the actions of foreign states against American citizens. Employing the analogy of reclamations in international tribunals, which apply the doctrine of laches although bound by no statute to do so, respondent suggests (brief, pp. 65-7) that the doctrine of laches

> "provides the only fair and equitable limitation on the sovereign's claim."

Respondent overlooks the fact that, under the rule of *nullum tempus*, the local sovereign is exempt from the application of laches as well as from that of limitations, and upon the

---

[1] It is significant that in *United States* v. *Thompson*, 98 U. S. 486, 491 (1878), the Court said with reference to the maxim *nullum tempus* "The doctrine is alike applicable to civil and criminal actions".

same grounds. This Court said in *U. S.* v. *Insley* (1889), 130 U. S. 263, 266:

> "This doctrine [of *nullum tempus*] is applicable with equal force, not only to the question of the statute of limitations in a suit at law, but also to the question of laches in a suit in equity."

To the same effect are *Smith* v. *U. S.*, 5 Pet. 292, 298 (1831); *Gibson* v. *Chouteau*, 13 Wall. 92, 99 (1871); *Armstrong* v. *Morrill*, 14 Wall. 120, 145 (1871); *Minturn* v. *U. S.*, 106 U. S. 437, 444, (1882); *U. S.* v. *Nashville etc. R. Co.*, 118 U. S. 120 (1886); *U. S.* v. *Beebe*, 127 U. S. 338, 344 (1888); *U. S.* v. *Mack*, 295 U. S. 480, 489 (1935).[1]

Respondent is therefore reduced to the necessity, either of conceding that upon its theory foreign sovereigns are subject to no limitation of time in any forum of this country and have not been since 1776, or of conceding that its theory is mistaken to the extent that foreign sovereigns are at least subject to laches. If that concession once be made, the theory breaks down entirely.

D. The Doctrine of Sovereign Immunity is Wholly Irrelevant.

Respondent argues at great length (brief, pp. 67-82) that sovereign immunity requires exemption from limitations of a foreign sovereign plaintiff. The connection between these propositions escapes us. The doctrine of immunity, as we have shown (main brief, p. 58), proceeds on the theory of an implied waiver of jurisdiction by the local sovereign conferring a license upon the foreign sovereign to come in with exemption from the jurisdiction, while the application to the

[1] Furthermore courts of equity often follow the analogy of the statute of limitations in finding laches or treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar. *Hayward* v. *National Bank*, 96 U. S. 611, 617 (1877); *Willard* v. *Wood*, 164 U. S. 502, 520 (1896).

foreign sovereign of the procedural rules of the forum, when the foreign sovereign or his claim are put in suit here, proceeds on the reverse theory of implied consent. There is no conflict between these theories. The requirement of security for costs or for judgment on the counterclaim, or the defense of limitations or contributory negligence can be applied against a foreign sovereign plaintiff in entire consistency with the principle which grants him immunity so long as he does not invoke the jurisdiction. The fact that a foreign sovereign plaintiff may be subjected to burdens to which the local sovereign is not subjected, and denied privileges which the local sovereign has (petr.'s main brief, pp. 58-9) shows the fallacy of the theory of equality among sovereigns to which respondent appeals.

The numerous precedents reducing the foreign sovereign plaintiff to the status of a private litigant (petr.'s brief, pp. 35-44) constitute a clear and unquestioned rule. Respondent has no comment to make thereon, except to say that the ordinary procedural rules to which the sovereign is thus subjected are "designed to facilitate its enforcement of its rights" and to secure an examination of its claims upon the merits (brief, p. 73). Obviously this is not so. It can hardly be said that the entertainment of a cross-claim against a sovereign, or the requirement of security for an affirmative judgment, or the allowance of the defense of contributory negligence, are designed to *facilitate* the examination of his claim. Such defenses against the foreign sovereign are designed purely and simply to insure the rendition of justice between the parties. The statute of limitations, requiring that the claim be put in suit while the evidence is fresh, is a rule of that kind. *U. S.* v. *Oregon Lumber Co.*, 260 U. S. 290, 299 (1922). The rule of limitations and laches as constituting a doctrine of repose and an assurance of peace is one of high public interest. The authorities in municipal and international law are collected at pages 45-51 of our main brief, and are not indeed seriously questioned by the respondent (brief, p. 75).

Moreover, respondent's suggestion that, in submitting to a municipal forum, the foreign sovereign might be deemed to submit to some rules (supposed to facilitate the examination of its claim upon the merits) and not to submit to others (not supposed to facilitate such an examination) (brief, p. 73) is obviously untenable. The foreign sovereign and his claim are either wholly submitted to the jurisdiction of the New York court or not submitted at all. They cannot be partly submitted. They cannot be submitted with respect to rules which the foreign sovereign likes and withheld as to rules he does not like. The operation of the statute of limitations under the rule of *Tillman* v. *Guaranty Trust Company*, 253 N. Y. 295 (1930) is automatic and not dependent upon the volition of the owner of the cause of action accrued, even though it may not be applied to such cause of action until the same has been put in suit.

The explanation attempted by respondent (brief, pp. 73-5) of the four cases in American jurisdictions which support the application of limitations to foreign sovereigns, by no means removes them from respondent's path. The fact cannot be obscured that, in holding that the foreign sovereign plaintiff is subject to the statute of limitations of the forum, both *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 329[1], and *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 F. 533, 536, applied exactly the distinction contended for by the petitioner in this case, applied by the District Court below (R. 271-2), and suggested by this court in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437. The courts in those two cases were not deterred from their conclusion by considerations of the kind which

---

[1] The fact that the controversy was between states of the Union which are not nations either as among themselves or in respect of foreign nations (respt.'s brief, p. 74) is immaterial. The states of the Union have equal rights as against each other, and are accorded sovereign immunity in this Court. *Wisconsin* v. *Pelican Insurance Company* (1887), 127 U. S. 265, 288; *Hands* v. *Louisiana* (1890), 134 U. S. 1, 15; *Louisiana* v. *Texas* (1900), 176 U. S. 1, 15; *U. S.* v. *Minnesota*, 270 U. S. 181, 195 (1926).

respondent sets up in this Court; in other words it made no difference that the State of Virginia enjoyed sovereign immunity as regards West Virginia, or that the governmental units involved in those cases were not named in the respective statutes of limitations (cf. respt.'s brief, p. 58). There is no escaping the fact that in *Royal Italian Government* v. *International Committee of YMCA*, 273 N. Y. 468 (1936), the New York court applied the statute of limitations to a foreign sovereign.

Non-existence of any immunity. Respondent too easily assumes that the bank deposit the subject of this action was entitled to sovereign immunity. Though the question need not be decided, it may be noted that any such conclusion is highly doubtful. The deposit was not, as respondent states (brief, p. 78), part of the proceeds of a public loan, but was the proceeds of a payment made by Mr. Ughet into the account with petitioner after the proceeds of the public loan were exhausted (R. 80; cf. respt.'s brief, p. 4). With respect to this account, banker and depositor held the ordinary relations of debtor and creditor, as was pointed out in *Kingdom of Roumania* v. *Guaranty Trust Company*, 250 F. 341, 345, certiorari denied 246 U. S. 663, which respondent cites. An attachment on the debt could no doubt be quashed upon a proper showing; but such a showing would involve either an intervention by the Ambassador or a suggestion by the Ambassador supported by our political department acting through the Attorney General. *Compania Española de Navegacion Maritima S.A.* v. *SS. Navemar*, No. 242, October Term 1937, decided January 31, 1938; *Ex Parte Muir* (1921), 254 U. S. 522, 532-3; *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 F. (2d) 705, certiorari denied 275 U. S. 497, and see L. Hand, D. J., in 300 F. 891, affirmed 32 F. (2d) 195. In the cases as to sovereign immunity upon which respondent relies, the immunity was effectively asserted by the sovereign in one of these two ways, usually through the political department of the government of the forum. *In the*

instant case no such immunity was ever asserted. Neither a suggestion supported by the State Department nor a legal proceeding was ever filed by the Ambassador, despite the fact that he knew the petitioner's set-off had been taken (R. 56). If he had sued, he would have been met by the set-off; the foreign sovereign's claim of a debt from the petitioner would have been contested; and the existence of any property entitled to sovereign immunity might never have been established. This issue the Ambassador deliberately postponed until the statute of limitations had run. Thus the possession in the foreign sovereign necessary to exclude judicial interposition (*The Davis*, 10 Wall. 15, 21) never existed. In such circumstances it is highly doubtful whether any property legitimately the subject of sovereign immunity can be regarded as having existed.

E. As to the Alleged Lack of Power to Bind a Foreign Sovereign by a Statute of Limitations.

It is argued that the State of New York lacks power to bind a foreign sovereign by the statute of limitations (respt.'s brief, pp. 79-82), on the supposed ground that the United States is our sole international sovereign charged with international rights and obligations and that the application to a foreign sovereign plaintiff of a municipal statute of limitations somehow invades this exclusive power. The baselessness of this contention has already been shown (pp. 30-3, 39-43 above). No question of sovereign immunity is involved, the operation of State law upon the sovereign being conditioned upon the submission of his claim to litigation in a municipal court. The regulation of foreign relations is in no way involved in or interfered with by the application of State procedure to a foreign sovereign plaintiff. The cases cited by respondent in this connection (brief, pp. 80-1) are instances of active interference by the States in foreign commerce or in extradition proceedings, which sharply illustrate the irrelevance of the principles involved to the situation

here presented. The enactment and application of the laws under which actions shall be conducted in the State courts is not a "field of national activity" (respt.'s brief, p. 82) in which the Federal constitutional scheme requires uniformity. Did the State of New York interfere with the conduct of foreign relations when it exacted security for costs of a foreign sovereign plaintiff in *Republic of Honduras* v. *Soto*, 112 N. Y. 310? The question answers itself.

In *Blythe* v. *Hinckley* (1901) 180 U. S. 333, this Court dealt peremptorily with the theory which respondent here advances. That case involved the question whether an alien could inherit land in the State of California. The contention was made that in the absence of treaty between the United States and the alien's country on that subject, California had no power to legislate thereon, and that the statute of California assuming to permit the alien to take property there was an encroachment upon the treaty power. Referring to *Geofroy* v. *Riggs*, (1890) 133 U. S. 528 the Court said at page 340:

> "But there is no hint in that case that in the absence of any treaty the State itself could not legislate upon the subject and permit aliens to hold property, real and personal, within its borders according to its own laws. This court has held from the earliest times in cases where there was no treaty that the laws of the State where the real property was situated governed the title and were conclusive in regard thereto."

The Court also said at page 340 with reference to the type of contention advanced by respondent:

> "Plaintiff urges that never before has the question been directly passed upon by this court. If he means that it has never heretofore been asserted, that in the absence of any treaty whatever upon the subject, the State had no right to pass a law in regard to the inheritance of property within its borders by an alien, counsel may be correct. The absence of such a claim is not so extraordinary as is the claim itself."

IV. As to the alleged revival of the barred claim in the hands of the United States (Respt.'s brief, Part Three, pp. 82-90).

Respondent's contention that by the assignment of the barred claim of the State of Russia to the domestic sovereign, the United States, it was somehow subjected to a revivifying bath and emerged as a live and enforcible claim, is no less than respondent's other propositions decisively contradicted by the authorities. *United States* v. *Buford* (1830) 3 Pet. 12, 29; *The King* v. *Morrall* (1818) 6 Price 24; *U. S.* v. *Nashville etc. R. Co.* (1885) 118 U. S. 120, 125 (dictum); *United States* v. *White*, 2 Hill 59, 61 (N. Y. 1841); *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade*, 48 T. L. R. 37 (1931). In *United States* v. *Buford*, the point was thought to be beyond argument, and that case is cited in the opinion of the Circuit Court of Appeals in this action (R. 282; 91 F. [2d] at 899) without any question as to its authority.

A. Under the Federal Rules of Decision Act a State Statute of Limitations is made Applicable to a Law Action by the United States in the Federal Courts as Assignee of a Claim which has Already Been Barred by the State Statute of Limitations.

In *United States* v. *Buford* the United States sought to enforce a claim barred by the Kentucky statute of limitations in the Federal District Court located in Kentucky. In holding that the action on the part of the United States was barred by the Kentucky statute of limitations, even though suit was brought in the Federal courts, the Supreme Court necessarily held that the Kentucky statute of limitations was made applicable in such a suit by the Federal Rules of Decision Act of September 24, 1789, c. 20, § 34, 1 Stat. 92, from which the present Rules of Decision Act (28 U. S. C. § 725, R. S. § 721) is derived.

It is significant that the United States Government in that case made the same argument that the respondent does here, and even cited the same authority as that which the respondent advances at page 83 of its brief. There the Government is reported to have argued (3 Pet. at p. 21):

> "The statute of limitations of Kentucky is not a bar to the suit of the United States. The United States vs. Hoar, 2 Mass. [sic] Rep. 311."

Here the respondent asserts (brief, p. 83):

> "Even assuming that the state statute might apply to a foreign sovereign, still it cannot apply to this action in which the United States is the plaintiff. *United States* v. *Thompson*, 98 U. S. 483; *United States* v. *Hoar*, 2 Mason 311, 26 Fed. Cas. p. 329, No. 15,373 * * *."

In the later case of *United States* v. *Nashville, etc. R. Co.*, 118 U. S. 120, 125 (1886), this Court said with reference to the applicability of the statute of limitations of Tennessee in a suit instituted in the Circuit Court of the United States for the Middle District of Tennessee:

> "They [the United States] take such paper subject to all the equities existing against the person from whom they purchase at the time when they acquire their title; and cannot therefore maintain an action upon it, if at that time all right of action of that person was extinguished, or was barred by the statute of limitations. *United States* v. *Buford*, 3 Pet. 12, 30; *The King* v. *Morrall*, 6 Price, 24."

Similarly in all cases where the United States is suing in a proprietary and not a sovereign capacity, or when it is suing on behalf of individuals and not on behalf of the public, it has been consistently subjected to the respective State statutes of limitations, made applicable in such an action by the Rules of Decision Act. *United States* v. *Beebe*, 127 U. S. 338 (1888). See *Cooke* v. *United States*, 91 U. S. 389, 398 (1875); *Wilber National Bank* v. *United States*, 294 U. S. 120, 124 (1935).

B. The Remedy of the United States Is Barred by the New York Statute of Limitations.

The argument that the remedy of the United States is not barred, even though the claim in suit was barred prior to its assignment to the United States (respt.'s brief, pp. 85-90), appears to be staked on the single proposition that the statute of limitations of Kentucky, involved in the decision of *United States* v. *Buford*, unlike the present New York statute of limitations, extinguished the right on a contract claim and did not merely bar the remedy. In fact, however, there is no substantial distinction between the present New York statute of limitations and the Kentucky statute of limitations in force at the time when *United States* v. *Buford* was decided in so far as their respective effects on contract claims are concerned. Both statutes stem from the English Limitation Act, 1623, 21 Jac. 1, c. 16, § 3, are closely modelled thereon, and all three statutes are substantially similar in their operation on contract claims.[1]

In *Bell* v. *Morrison*, 1 Pet. 351 (1828), the principal case relied upon by respondent in its attempted distinction of the Kentucky statute of limitations on contract claims, Mr. Justice Story said (p. 359):

> "The statute of limitations of Kentucky, is substantially the same with the statute of 21 of James, ch. 16, with the exception, that it substitutes the term of five years, instead of six."

As with the English statute[2] and the New York statute,[3] the Kentucky statute of limitations, as construed by the highest courts of Kentucky about the year 1830[4] barred

---

[1] The texts of these three statutes are set forth in Appendix III, page 9 below.

[2] *Wainford* v. *Barker*, 1 Ld. Ryam. 232 (1697); *Courtenay* v. *Williams*, 3 Hare, 539, 551 (1844); *Poole* v. *Poole*, 7 Ch. App. 17 (1871). See also XX Halsbury's Laws of England (2d Ed.) page 602.

[3] *Lightfoot* v. *Davis*, 198 N. Y. 261, 224 (1910).

[4] The year of the decision in *U. S.* v. *Buford*, 3 Pet. 12.

the remedy only on a contract claim and did not extinguish the obligation of the contract, as the respondent mistakenly asserts (brief, pp. 87-90). *Graves* v. *Grave's Executor*, 2 Bibb 207, 208-9 (Ky. 1810); *Smart* v. *Baugh*, 3 J. J. Marsh. 363 (Ky. 1830). See also *Davis* v. *Ballard*, 1 J. J. Marsh. 563, 573, 580 (Ky. 1829). In *Graves* v. *Grave's Executor*, the Court of Appeals of Kentucky said, in holding that the statute of limitations of the forum should govern in an action on contract (2 Bibb at 208-9):

> "The statute of limitations does not affect the validity of the contract, but the time of enforcing it: or, in other words, it does not destroy the right but withholds the remedy. It would seem to follow, therefore, that the *lex fori*, and not the *lex loci* was to prevail with respect to the time when the action should be commenced."[1]

In *Smart* v. *Baugh*, 3 J. J. Marsh 363, 367 (1830), the Kentucky Court of Appeals dealt with a case of acquisitive prescription based upon adverse possession of a slave, and then distinguished extinctive prescription as follows:

> "But it is not so in debt, because the statute of limitations does not destroy, nor pay the debt. This has been abundantly established by authority since the time of Holt.[2] A debt barred by time is a sufficient consideration for a new asumpsit. The statute of limitations only disqualifies the plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency; and the privilege can only be asserted by plea."[3]

---

[1] This statement continued to be the law of Kentucky long after the decision of *United States* v. *Buford* in 1830. *McArthur* v. *Goddin*, 75 Ky. 279 (1876); *Bennett* v. *Devlin*, 56 Ky. 353 (1856).

[2] In *Draper* v. *Glassop*, 1 Ld. Raym. 153 (cir. 1789), Holt stated that the statute of limitations might be given in evidence under the plea *nil debet*. The Kentucky court disagreed with this statement of Holt because, under Kentucky law, the debt remained even though barred by the statute of limitations (p. 366).

[3] See also to the same effect, *Smart* v. *Johnson*, 3 J. J. Marsh, 373 (Ky. 1830).

This opinion was cited with approval and quoted at some length by this Court in *Campbell* v. *Holt*, 115 U. S. 620, 624-5 (1885), for the proposition that the statute of limitations does not extinguish the debt but merely bars the remedy of the creditor.[1]

Respondent's only argument on this point, indeed, seems to be based upon the fallacious contention that the present New York statute of limitations differs from the statute of Kentucky underlying *U. S.* v. *Buford* with respect to tolling of the statute by new promises or acknowledgments (brief, pp. 87-9). But the Kentucky cases discussed in *Bell* v. *Morrison*, 1 Pet. 351 (1828) and those mentioned by respondent (brief, p. 87n) show merely a refusal to follow certain early decisions of the English courts whereby virtually any communication or action on the part of the debtor was held to toll the statute of limitations. These cases establish no material divergence between the law of Kentucky at the time and that of England and New York today on the same subject.

As to the English law see Lord Sumner's opinion in *Spencer* v. *Hemmerde* [1922] 2 A. C. 507, 519-36. The same confusion existed in the State of New York in the first half of the nineteenth century, as is clearly illustrated in the *obiter* discussion of the subject, in *Henry* v. *Root*, 33 N. Y. 526, 528-536 (1865) which is the most recent New York authority cited by the respondent (brief, pp. 88-9) on this particular subject. In holding that there was sufficient evidence to

---

[1] *Campbell* v. *Holt*, it should be remembered, is one of the leading cases holding that, inasmuch as the statute of limitations bars the remedy only and does not discharge the debt, the legislature of a State may extend the period of limitations on contract claims even after the statute bar has fallen. It is significant that the New York Court of Appeals has expressly refused to accept either *Campbell* v. *Holt*, or the dictum in *Hulbert* v. *Clark*, 128 N. Y. 295, 297 (1891), upon both of which the respondent relies, as establishing the law of that State (brief, pp. 84-5). See *Hopkins* v. *Lincoln Trust Company*, 233 N. Y. 213, 215 (1922), *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 276-7 (1924); cf. *Tillman* v. *National City Bank of New York*, 276 N. Y. —, decided January 11, 1938.

establish the fact that the defendant on coming of age, had affirmed a contract entered into during his period of infancy, Davies, J., reviewed New York authorities on the tolling of the statute of limitations and concluded, despite conflicting decisions, that the creditor should recover on the old promise rather than the new one. *Henry* v. *Root* has seldom been referred to since by the New York Court of Appeals, and does not represent the present law of the State on the tolling of the statute of limitations by acknowledgment or new promise. In the most recent decision by the New York Court of Appeals on that subject it was held that part payment by the maker of the note would not extend the period of limitations against a guarantor on the note. *Peoples Trust Co.* v. *O'Neil,* 273 N. Y. 312 (1937). Hubbs, J. stated (p. 316):

> "An action on a contract brought after six years from its due date *must be brought on the new promise,* express or implied, which operates to take the claim out of the statute" (Italics ours).

See to the same effect *Brooklyn Bank* v. *Barnaby,* 197 N. Y. 210, 220, 225 (1910); *Schutz* v. *Morette,* 146 N. Y. 137, 143 (1895); *Butler* v. *Johnson,* 111 N. Y. 204, 212 (1888); *Shoemaker* v. *Benedict,* 11 N. Y. 176, 183-4 (1854).

Thus the New York courts follow the precise holding of this Court in *Bell* v. *Morrison,* 1 Pet. 351 (1828), based upon the Kentucky statute of limitations, that a new promise or acknowledgment of the debt by one partner, after the dissolution of the partnership, will not revive the debt as to the other partners or as to the company. *Van Keuren* v. *Parmelee,* 2 N. Y. 523, 533 (1849); *Harper* v. *Fairley,* 53 N. Y. 442, 445, (1873). So, also, as in Kentucky (*Head's Executor* v. *Manners' Adm'rs,* 5 J. J. Marsh. 255 (1831), cited by respondent at page 87n) the New York court holds that an executor cannot revive a claim against the estate by mere acknowledgment, but can only do so by an express

promise. *Schutz* v. *Morette*, 146 N. Y. 137 (1895); *McLaren* v. *McMartin*, 36 N. Y. 88 (1867); *Bloodgood* v. *Bruen*, 8 N. Y. 362 (1853). Similarly one joint obligor cannot revive the joint claim but can only subject himself to liability by a new promise or acknowledgment. *Peoples Trust Co.* v. *O'Neil*, 273 N. Y. 312 (1937) and cases there cited.[1]

United States v. *Buford*, therefore, cannot be explained away by the respondent as a special case.[2] On the contrary it merely applies the fundamental law of assignments that the assignee is subject to any defenses or equities that the debtor was free to assert against the assignor. The case has been frequently cited for this broad proposition. *United States* v. *Bank of New York & Trust Co.*, 77 F. (2d) 866, 869 (C. C. A. 2, 1935), affirmed 296 U. S. 463; *United States* v. *Belmont*, 85 F. (2d) 542, 543 (C. C. A. 2, 1936), reversed on other grounds 301 U. S. 324; *U. S. ex rel. Skinner & Eddy* v. *McCarl*, 8 F. (2d) 1011 (C. A. D. of C. 1925); *The Falcon*, 19 F. (2d) 1009, 1013 (D. Md. 1927); *In re Cooke* 19 Fed. 88, 94; *Hildebrand* v. *Kinney*, 172 Ind. 447 (1909). Indeed this broad doctrine is so firmly established in the general law that it is frequently applied without the citation of specific authority. It has been so applied with reference to the very Litvinoff assignment here invoved. *United States* v. *National City Bank*, 83 F. (2d) 236 (C. C. A. 2, 1936), cert. den. 299 U. S. 563; *United States* v. *President and Directors of The Manhattan Company*, 276 N. Y. 396, 406-7 (1938); *United States* v. *Belmont*, 301 U. S. 324, 335 (1937).

---

[1] New York Civil Practice Act §59 speaks of an acknowledgment or promise in writing which tolls the statute of limitations as evidence of a "new or continuing contract". In this respect the New York statute is in accord with the general trend of American law. Angell on Limitations (6 ed) pages 240-1; Restatement, Contracts §§86, 91.

[2] We need only notice in passing that the excerpt from the reported argument in the case (respt.'s brief, p. 33n) relates to a distinct and collateral issue having nothing to do with the effect of the assignment to the United States of a barred claim; viz. the issue whether the trial court erred in refusing to permit an amendment after judgment had been rendered against the United States.

It has long been recognized that property or claims of a sovereign government, acquired as successor or transferee from another government, are subject to the same rights, obligations and defenses as in the hands of the old government.

> *United States* v. *Prioleau*, 2 H. & M. 558, 563 (1869);
> *United States* v. *McRae*, L. R. 8 Eq. 69, 75 (1869);
> *Voevodine* v. *Government of the Commander-in-Chief of the Armed Forces in the South of Russia*, 232 App. Div. (N. Y.) 204, 209 (1931).

This rule having been applied against the United States in the cases cited, it should as well, on respondent's theory of the equality of sovereigns, be applied against the State of Russia to which, under the Litvinoff assignment, the United States has undertaken to account for any recoveries.

Against this uniform course of decision respondent advances but one case, *South Dakota* v. *North Carolina*, 192 U. S. 286 (1904), a decision by a sharply divided court on an entirely distinct question. That case dealt, not with defenses against an assigned claim, but solely with the capacity of the State of South Dakota to sue the State of North Carolina in this Court on bonds issued by the latter. *United States* v. *Buford* involved such radically different issues that it was not even referred to in the opinion of a majority of the Court. And, although Mr. Justice White referred to the *Buford* case in his dissenting opinion by way of analogy and by way of analogy only, the majority, instead of overruling the *Buford* case *sub silentio* (respt.'s brief, p. 89), apparently saw no analogy in the *Buford* case whatever. The substance of the decision in the *South Dakota* case, it is submitted, is contained in the following two sentences at page 312:

> "Obviously that jurisdiction [of this Court in a suit by one state of the Union against another] is not affected by the fact that the donor of these bonds could not invoke

it * * * The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy."

No question of the statute of limitations was involved; indeed, the statute was not pleaded.

Subsequently in *Monaco* v. *Mississippi*, 292 U. S. 313 (1934) this Court indicated that it is prepared to restrict rather than extend its decision in the *South Dakota* case. Leave to file a declaration in an original proceeding against the State of Mississippi for the recovery of the principal and interest of certain bonds issued by that State was denied to the Principality of Monaco, seeking recovery as transferee of the bonds. The *South Dakota* case was distinguished on the ground that it involved a suit between sister states and not a suit by a foreign state against a non-consenting state of the Union.[1] By unanimous decision, this Court held that it had no jurisdiction to entertain a suit brought by a foreign state against a state of the Union without her consent. At the conclusion of his opinion, the Chief Justice significantly observed (p. 332):

"We conclude that the Principality of Monaco * * * is in no better case than the donors of the bonds, * * *."

C. Upon the Circumstances of This Case Petitioner Has Vested Right in the Account.

The present case shows a *bona fide* claim of right by the petitioner to avail of its debt to the State of Russia in payment of losses which it sustained at the hands of that State, a claim of a property right in the deposit account openly and adversely maintained for twenty years. This claim of title was based on the common law right of set-off or banker's lien long judicially recognized. *Falkland* v. *St. Nicholas National*

[1] The defense of the statute of limitations and laches was interposed by the State of Mississippi, and those issues were argued (pp. 318-320) but were not discussed in the opinion of the Court.

Bank of New York, 84 N. Y. 145 (1881); *People* v. *St. Nicholas Bank*, 44 A. D. 313, 318-9 (First Department 1899); *Davis* v. *Bowsher*, 5 Term Rep. 488, 491 (1794). Upon these facts the petitioner's right is closely analogous to the prescriptive right which this Court in *Campbell* v. *Holt* (1885), 115 U. S. 620, 628, held would be protected from subsequent impairment by a retroactive change in the statute. Moreover, subsequent decisions of this Court, such as *U. S.* v. *Oregon Lumber Co.*, 260 U. S. 290 (1922), have shaken the authority of *Campbell* v. *Holt* with respect to the effect due to the perfected bar of limitations even as against pure contract claims.[1] The majority of State courts have preferred the dissenting opinion of Bradley and Harlan, JJ., who well said (p. 631):

> "The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. * * * The fact that this defense pertains to the remedy does not alter the case. Remedies are the life of rights, and are equally protected by the Constitution."

See the cases collected in 12 Corpus Juris 980-1; 2 Cooley's Constitutional Limitations (4th Ed.) pages 760-5. The New York Court in particular has refused to follow the doctrine of *Campbell* v. *Holt*. *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271 (1924). In *Tillman* v. *National City Bank and Guaranty Trust Company*, 276 N. Y. , 13 N. E. (2d) 52, decided January 11, 1938, the New York Court rejected the contention that Civil Practice Act §977-b, subdivision 18 (respt.'s brief, p. 99) enlarged the statute of limitations in connection with a sheriff's action to enforce the lien of an attachment upon funds of a nationalized Russian corporation, where objection was made that the application retroactively of the new statute would deprive defendant-respondent of property without due process of law.

[1] See comment 29 Yale L. J. 91 (1919); comment 35 Yale L. J. 478 (1926).

V. As to the alleged conflict between the New York statute of limitations and the Litvinoff assignment (Respt.'s brief, Part Four, pp. 90-7).

Respondent's argument on this branch of the case requires it to force beyond reason both the decision in the *United States* v. *Belmont*, 301 U. S. 324, and the language of the Litvinoff assignment.

As to the *Belmont* decision, it is to no avail merely to quote sentences therefrom, as respondent does, without relation to the point decided. Insistence upon "the deliberate character of the broad language used" (respt.'s brief, p. 93) is inappropriate in view of the positive limitations which the Court imposed upon its decision, 301 U. S. at 333, 337. When the Court thus expressly restricted the import of its *whole* opinion, we see no justification for appealing to "the first part of the opinion" (brief, p. 93) against "the separate second part of the opinion".

In straining to its utmost extent selected language of the majority in the *Belmont* case, respondent of course disregards the real point of that case, which was to determine what *public policy* applied in the ascertainment of the law determining the title conferred upon the United States by the Litvinov assignment. Not only has respondent ignored the point of the decision on this branch of the argument, but it has gone so far as to cite to this Court (brief, pp. 55, 85) New York Civil Practice Act § 977b, enacted in 1936, which, as applied to the property of nationalized corporations in New York, respondent presumably considers to be invalid under the *Belmont* decision.

If there were a conflict between the Litvinoff assignment and the New York statute of limitations, it is plain that the assignment could not override the statute. The assignment is conceded not to be a formal treaty requiring the advice and consent of the Senate (respt.'s brief, p. 92), and hence is not the supreme law of the land. The cases cited by re-

spondent for the exercise of the power over foreign relations as overriding state statutes[1], involved a formal treaty, namely that between the United States and Great Britain concluded September 3, 1782.

Moreover, even in the case of a formal treaty, it is clear that state legislation will not be deemed modified thereby unless it is really "inconsistent" with the treaty. *Nielsen* v. *Johnson* (1929) 279 U. S. 47, 52; *Todok* v. *Union State Bank* (1930) 281 U. S. 449. In *French Republic* v. *Saratoga Vichy Springs Co.*, 191 U. S. 427, where a claim asserted in the name of the French Republic for the benefit of a French national was held barred by laches, this Court found no conflict to be raised by the commercial treaty with France, saying that the provision therein for protection of trademarks (p. 439)

> "could never have been intended to put them [French nationals] on a more favorable footing than our own citizens or to exempt them from the ordinary defenses that might be made by the party prosecuting."

The Jay treaty involved in *Ware* v. *Hylton* and *Hopkirk* v. *Bell* plainly conflicted with the Virginia law for the confiscation of debts, by providing in the fourth article that creditors on either side should "meet with no lawful impediment" to the recovery in sterling of all *bona fide* debts theretofore contracted. Even the formal exercise of the treaty power is carefully limited by the judiciary in the protection of individual rights. *Haver* v. *Yaker* (1869) 9 Wall. 32, 34; *United States* v. *Arredondo* (1832) 6 Pet. 691, 748; *Dooley* v. *United States* (1901) 182 U. S. 222, 230.

But in the present case we have no conflict at all. Respondent in its brief is unable to point to a conflict beween the Litvinoff assignment and the existing New York code of procedure including the statute of limitations. Respondent

---

[1] *Ware* v. *Hylton*, 3 Dall. 199 (1796); *Hopkirk* v. *Bell*, 3 Cranch 454 (1806). Only the latter involved a statute of limitations.

confines itself to the argument that the exercise of the Federal power of foreign relations in making the international compact "strongly implies" that State laws should not impede it. This statement may be assumed as true. Still a strong implication that a State law should not impede the execution of an executive agreement does not prove the impediment or establish the conflict. Respondent's argument involves the conclusion that, unless respondent in all cases in actions brought under the Litvinoff assignment, is permitted to recover, then the international compact is "impeded" or "trammelled." No such conclusion can be seriously urged.

The test of respondent's argument is found in the reiterated statement that it was not intended by the parties to the Litvinoff assignment that its consummation should be controlled or impeded or interfered with by State laws. What does such a statement mean? It can mean only that the parties to the Litvinoff assignment intended that the United States should take greater rights thereby than the State of Russia had; that the United States should be able to enforce claims in disregard of the statute of limitations in circumstances where the Soviet Government could not have done so. This must be the meaning of respondent's argument (brief, p. 92) that by the Litvinoff assignment the United States "impliedly undertook that it was in a position to and would collect the claims." The absurdity of any such interpretation of the Litvinoff assignment needs no emphasis. The very phrasing of the assignment in terms of monies admitted to be due or that may be found to be *due to the State of Russia* (petr.'s main brief, pp. 87-8), forbids the fantastic assumption that either sovereign supposed that the United States, in taking the assigned claims, purported to divest them, even if it could, of inherent restrictions and equities.

Finally it is to be noted that the New York statute of limitations, alleged to impede the exercise of the Federal power of foreign relations through the Litvinoff assignment of 1933, antedates such assignment. It antedates it by more than

150 years. Moreover, the acquisition of rights under the statute of limitations by the petitioner through its transactions with representatives of the State of Russia also antedated the Litvinoff assignment. The set-off was completed, and perfected by the defense of limitations before 1933. In such circumstances, the Litvinoff assignment cannot be construed as retroactive. *De Biasi* v. *Normandy Water Co.*, 228 F. 234, 240 (D. C. N. J. 1915). Cf. *Hopkirk* v. *Bell*, 3 Cranch 454, 458 (1806), where the court carefully refrained from holding that the Jay Treaty of 1783 would revive a claim already barred by statute even though, as already noted, the United States Government formally covenanted that the foreign creditor should "meet with no lawful impediment" to the recovery of his debt.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

JOHN W. DAVIS,
RALPH M. CARSON,
Counsel for Petitioner.

April 4, 1938.

APPENDIX III.

STATUTES AT LARGE (39 Q. Eliz. to 12 Chas. 2—1597-1660).
(1623) 21 James c. 16.

CHAPTER XVI.

An act for limitation of actions, and for avoiding of suits in law.

III. And be it further enacted, That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) (2) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; (4) and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after.

CHAPTER CCLVIII.

An ACT to reduce into one, the several acts or parts of acts concerning Limitations of Actions.

Approved December 17, 1796.

This is copied verbatim from the laws of Virginia. A small amendment was made to it at the January session of 1798, (Vol. II. Chap. 38). In 1807 a special act of limitations was passed as to suits by persons held in slavery suing for their freedom, (Vol. III. Chap. 485).

SEC. 4. All actions of trespass *quare clausum fregit;* all actions of trespass, detinue, actions *surtrover* and replevin, for taking away of goods and chattles; all actions of account, and upon the case, other than such accounts as concerns the trade of merchandize between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time hereafter, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case other than for slander; and the said actions for account; and the said actions for trespass, debt, detinue and replevin for goods and chattels; and the said action of trespass *quare clausum fregit,* within five years next after the cause of such action or suit, and not after; and the said action of trespass, assault and battery, wounding and imprisonment, or any of them, within three years next after the cause of such action or suits, and not after; and the said action upon the case for words, within one year next after the words spoken, and not after.

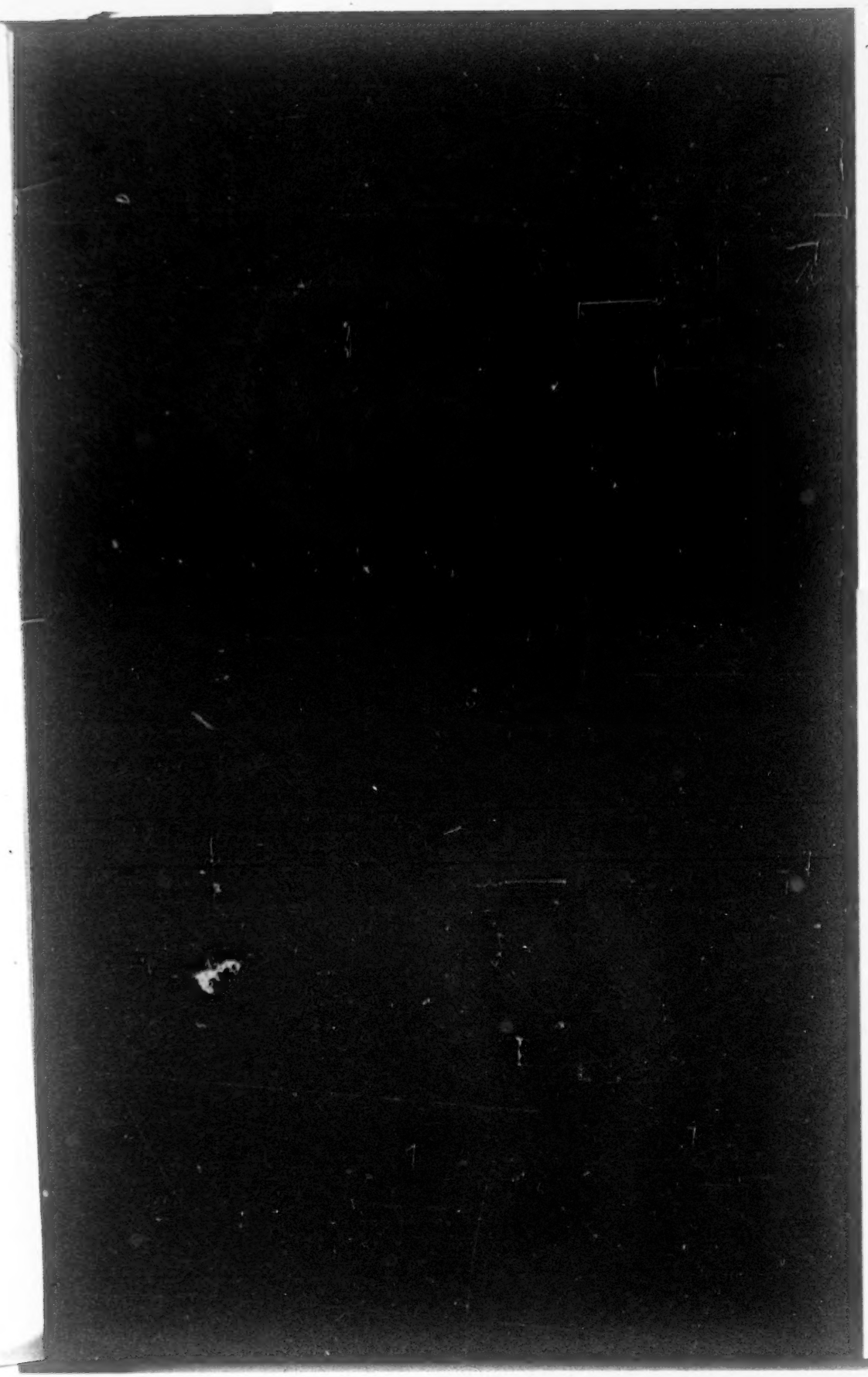
COLONIAL LAWS OF NEW YORK—Vol. I—1664-1719.

(CHAPTER 16).

(Copied from the original in the office of the Secretary of State. The portion of the original law, containing the signature of the Governor, and the date of passage is torn off. The date of its passage, as October 24, 1684, is given by E. B. O'Callaghan, in Hist. Int. to Journals of the Legislative Council of New York, p. 12).

* * * And Be it Further Enacted that all Actions of Trespasse Detinùe, Action of Trover, and Replevin for Taking away of Goods and Chattles all Actions of Account & upon the Case, other when such accounts as Concerne the Trade of Merchandise between Merchant and Merchant their ffactors or servants, all Actions of Debt grounded upon any Lending or Contract without specialty all Actions of Debt ffor arrearages of Rent, and all actions of Assault, Menace, Batery, Wounding & Imprisonment or any of them which shall be sued or brought att any time after the beginning of this present session of assembly shall be Commenced and sued within the time & Limitation hereafter expressed and not after (That is to say) The said Actions upon the Case (other then for slander) and the said Actions for account, and the said Actions for Trespasse, Debt Detinue and Replevin for goods or Cattle within three years, after the beginning of this present session of assembly or within Six years after the Cause of such Actions or suit & not after; And the said Actions of Trespass of Assault Battery Wounding Imprisonment or any of them, within six months next after the beginning of this present sessions of Assembly or within nine months next after the Cause of such Actions or suit and not after, And the said action upon the Case for words, within six months after the beginning of this present session of assembly or within nine months next after the words spoken and not after.

[We omit reference to the substantially similar enactment of February 26, 1788, Section X, Laws of New York 11th Session, Cap. XLIII. The present New York statute, Civil Practice Act §§ 48 and 15, is quoted at p. 92 of our main brief.]



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and assignment involved	2
Statement	2
Argument	6
Conclusion	17
Appendix	18

CITATIONS

Cases:

Administration of Siberian Railroads v. *Representative of the Supreme Council of People's Economy*	14
Administrator of Hungarian Property v. *Finegold* (K. B. Div.) 144 Law Times Reports 670	17
American Construction Co. v. *Jacksonville Railway*, 148 U. S. 372	6
Benjamin v. *Dubois*, 118 U. S. 45	6
Berizzi Bros. Co. v. *S. S. Pesaro*, 271 U. S. 562	6, 15
Bostwick v. *Brinkerhoff*, 106 U. S. 3	6
Brummel v. *McPherson*, 5 Russ. 263	16
Commissioners of the Sinking Fund of Louisville v. *Buckner*, 48 Fed. 533	12
Dexter & Carpenter v. *Kunglig Jarnvagsstyrelsen*, 43 F. (2d) 705	11
Dupont De Nemours & Co. v. *Davis*, 264 U. S. 456	10
Explanation of Plenum of Supreme Court of R. S. F. S. R. Protocol No. 10, June 29, 1925	15
Fields v. *United States*, 205 U. S. 292	6
Foreyth v. *Hammond*, 166 U. S. 506	7
French Republic v. *Saratoga Vichy Spring Co.*, 191 U. S. 427	9, 11
French Republic & Board of Supervisors v. *Jefferson County*, 252 S. W. 124	10
Gibson v. *Chouteau*, 13 Wall. 92	11
Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U. S. 251	6, 7
Harkomprod v. *Mosselprom*, Apr. 17, 1923, 2 Dec. V. A. K. (Supreme Arbitration Council) No. 98	15
Kingdom of Roumania v. *Guaranty Trust Co.*, 250 Fed. 341	11

Cases—Continued. Page.
Lambert v. *Taylor*, 4 B. & C. 138 15
Lau Ow Bew, Petitioner, 141 U. S. 583 7
Parlement Belge, The, L. R. 5 P. D. 197 15
Prudence Co. v. *Fidelity & Deposit Co. of Md.*, 297 U. S. 198 7
Royal Italian Government v. *International Committee of Y. M. C. A.*, 273 N. Y. 468 12
Saratov Gubkomotdel v. *Riazan-Ural R. R.*, May 3, 1923, 3 Dec. V. A. K. No. 106 15
The Exchange, 7 Cranch 116 10
Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117 7
Stringfellow v. *Atlantic Coast Line R. Co.*, 290 U. S. 322 7
The Three Friends, 166 U. S. 1 7
United States v. *Bank of New York & Trust Co.*, 296 U. S. 463, 558 7
United States v. *Belmont*, 301 U. S. 324 ..... 6, 7, 9, 16, 17
United States v. *Brown*, 247 N. Y. 211 12
United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 16
United States v. *Diekelman*, 92 U. S. 520 10
United States v. *Hoar*, 2 Mason 311, Fed. Cas. No. 15373 9
United States v. *Nashville, & c. R'y. Co.*, 118 U. S. 120 ..... 9, 10
United States v. *Thompson*, 98 U. S. 486 ..... 9, 11
Western Lunatic Asylum v. *Miller*, 29 W. Va. 326, 1 S. E. 740 12
Woods, In re, 143 U. S. 202 6

Statutes:
Rule 107 of the New York Rules of Civil Practice 3
Russian Civil Code, Art. 44 14
Russian Railroad Code, Secs. 101 and 102 15

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 416–441) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 455–465) is reported in 91 F. (2d) 898.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 23, 1937 (R. 466). The petition for a writ of certiorari was filed November 9,

1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the petitioner's communications to representatives of the Kerensky Government of Russia constituted an unequivocal repudiation of petitioner's liability for the bank deposit in question.

2. Whether those communications were in any way notice to and binding on the Soviet Government.

3. Whether a state statute of limitations operates to bar the claim of a foreign sovereign.

4. Whether a state statute of limitations can operate to defeat the consummation of the international compact between the United States and the Soviet Government which contains the Litvinov Assignment.

STATUTES AND ASSIGNMENT INVOLVED

The statutes involved are found on pages 11 to 13 of the petition. The Litvinov Assignment is printed in the Appendix, *infra*, p. 18.

STATEMENT

On November 16, 1933, by an exchange of letters between the President of the United States and

Maxim Litvinov, Commissar for Foreign Affairs of the U. S. S. R., the Soviet Government assigned to the United States all of its claims against American nationals. One of these claims is the one now involved, which represents the balance of a deposit account opened with the petitioner in 1916 by the Imperial Russian Government. The balance of this foreign government account on December 12, 1917, after the Soviet Government succeeded the prior government of Russia on November 7, 1917, was and remains $4,976,722.78, with interest (R. 5).

One of the first acts of the Soviet Government was the dismissal of Boris Bakhmeteff, who had been the Ambassador of the prior Provisional or Kerensky Government of Russia to the United States, and Serge Ughet, Financial Attaché of the former Government of Russia, on November 26, 1917, upon their failure to acknowledge allegiance to the Soviet Government (R. 301–303, 93, 354). The Soviet Government did not recognize either Bakhmeteff Ughet as its representatives (R. 353).

The United States brought this action on September 21, 1934, after diplomatic recognition, to recover from the petitioner the aforesaid balance of the deposit account, with interest. The petitioner filed, in lieu of an answer to the Government's complaint, a motion pursuant to Rule 107 of the New York Rules of Civil Practice, supported by

affidavits of officials of the bank and others, claiming that the New York six-year statute of limitations had barred the claim prior to the institution of the action. The affidavits in support of the motion assert that the petitioner on several occasions prior to 1922 had declined to surrender the account to the aforesaid diplomatic officials of the Provisional Government of Russia. These affidavits also assert that the Russian Government was indebted to the petitioner in the sum of $9,000,000. There is no support in the record for the statement of such a liability, beyond self-serving entries made on the books of the petitioner. The Russian Government at no time owed to the petitioner any such amount as $9,000,000.[1] That fact will be fully established on the trial of this action.

The affidavits submitted by the Government in opposition to the petitioner's affidavits state facts which, it is submitted, establish that the petitioner made no unequivocal refusal to pay the deposit account.[2]

The District Court, in granting the petitioner's motion, concluded that prior to the diplomatic rec-

---

[1] The figure of $9,000,000 was based upon an alleged dollar value of rubles held to the credit of petitioner by banks in Russia. At the trial respondent will prove that the arbitrary value adopted by petitioner was, in fact, greatly in excess of the true value of rubles measured in dollars.

[2] Petitioner (p. 4) does not contend that the statute of limitations began to run unless there was an unqualified refusal to pay.

ognition of the Soviet Government and the assignment in question a repudiation of the debt had been communicated to Bakhmeteff and Ughet, that such notice bound the Soviet Government, and that the New York statute of limitations was a bar to this action (R. 416–441).

The petitioner's references to the "findings of fact" and to the "facts founds" by the District Court (pp. 5, 6) are misleading. The District Court did not purport to make a final determination of the facts of an unequivocal repudiation of the debt. Its view of the facts based on the affidavits was expressed only in its oral opinion (R. 416–441). There were no formal findings of fact or trial of the issue. The District Court recognized that its view of the facts would not bind the appellate courts.[2]

The Circuit Court of Appeals, in an opinion by Circuit Judge Swan, held that the local statute did not run against a foreign sovereign and that no state statute ran against a foreign sovereign in view of the complete power over international affairs vested in the national government, citing *United*

[2] This is made clear in the following language of the District Court's opinion (R. 433):

"* * * As a matter of fact, I think about all that my decision of this case amounts to is that it determines who shall print the appeal papers.

"Moreover, there is another feature which is worth noting. On the fact side this case carries with it no presumption of the correctness of my findings, because the evidence is in the shape of affidavits or depositions. Each appellate court in passing on the papers, therefore, will be in identically the same position as the trial court."

States v. *Belmont,* 301 U. S. 324 (R. 455–458). Circuit Judge Manton wrote a separate concurring opinion (R. 459–465) and Judge Chase dissented without opinion. The court did not consider the other questions decided by the District Court.

ARGUMENT

1. *The order of the Circuit Court of Appeals is not final.* The order of the court below (R. 466), reversing the order of the District Court which had dismissed the complaint and thus reinstating the complaint and requiring the case to be remanded for further proceedings, does not dispose of this case and, therefore, is interlocutory. *Benjamin* v. *Dubois,* 118 U. S. 46, 48; *Bostwick* v. *Brinkerhoff,* 106 U. S. 3. That fact alone is "sufficient ground for the denial of the application" for certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 258. The general rule that interlocutory orders will not be reviewed avoids appellate consideration of orders which in the progress of the action may "become quite unimportant by reason of the final result, or of intervening matters" (*American Construction Co.* v. *Jacksonville Railway,* 148 U. S. 372, 384), and, therefore, petitions to review such orders have been denied in the absence of special circumstances. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co., supra; Fields* v. *United States,* 205 U. S. 292, 296; *American Construction Co.* v. *Jackson-*

ville Railway, 148 U. S. 372, 378; *In re Woods*, 143 U. S. 202, 205–206.[4]

The final disposition of this case after answer and trial may be on a ground which will not require consideration of the question decided by the interlocutory decision of the court below.[5]

2. *The fact, and effect, of the alleged unequivocal refusal to pay the debt has not been conclusively determined.* a. The District Court determined on the affidavits on the motion to dismiss the complaint that an unequivocal refusal had been made and that thereupon the period of limitations prescribed by

---

[4] The exceptional jurisdiction to review such orders is "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258. Compare *Prudence Co.* v. *Fidelity & Deposit Co. of Maryland*, 297 U. S. 198; *Stringfellow* v. *Atlantic Coast Line R. Co.*, 290 U. S. 322; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 121; *Forsyth* v. *Hammond*, 166 U. S. 506; *The Three Friends*, 166 U. S. 1, 49; *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587.

[5] The petition (pp. 8–9) refers to the fact that certiorari was granted in *United States* v. *Belmont*, 299 U. S. 537, and *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 558, and suggests that the question here involved should be settled now for guidance of the lower courts in other cases involving the Litvinov Assignment. In both of the cases referred to this Court reviewed final orders dismissing the complaints. In the *Belmont* case the erroneous decision of the lower court, if not reversed, would have barred many other pending claims by the United States. But the question involved here does not even dispose of this case in which the petitioner admits (p. 9) that there are other issues.

the New York statute of limitations began to run.[6] The respondent contended in the Circuit Court of Appeals that the New York statute did not apply, and that even if it did, the affidavits did not disclose an unequivocal refusal and, at least, presented an issue of fact on the question of refusal which should be determined on trial. The Circuit Court of Appeals determined that the statute of limitations did not apply and so did not consider the other questions.

If this Court grants the writ and reverses the court below it will be necessary, in doing so, either to determine the fact of an unequivocal repudiation of the debt on the affidavits or to remand the case for determination of that question on the trial. It is submitted that on such a record the application of the statute of limitations in this situation should not be determined and that for this reason also the petition should be denied.

b. Moreover, even if the Circuit Court of Appeals were reversed, the question of application of limitations here could not be decided finally until

---

[6] The petitioner contends (p. 9) that "The question of limitations is fully presented by this record * * *." The respondent emphatically disagrees and believes that the present record is wholly inadequate and deficient as a final and complete presentation of all of the facts of repudiation of the debt because it consists entirely of affidavits based on information largely in the petitioner's control and does not give the respondent the opportunity to bring out all the facts by a trial and examination and cross-examination of witnesses, including the parties who made the affidavits in behalf of the petitioner.

the determination of the correctness of the District Court's rulings that communications to Boris Bakmeteff and Serge Ughet after 1917 commenced the period of limitations against the Soviet Government. The Circuit Court of Appeals did not consider this point. The respondent contended and it seems clear that the Soviet Government became owner of this government bank deposit immediately upon the commencement of its existence as the government in Russia on November 7, 1917, under the doctrine of retroactivity of diplomatic recognition (*United States* v. *Belmont*, 301 U. S. 324, 328–330). Therefore, the Soviet Government was not bound by later communications to Bakmeteff and Ughet, representatives of the preceding Kerensky Government, who never represented the Soviet Government (R. 353). It is conceded that no repudiation was communicated to the Soviet Government.

3. *The statute of limitations does not run against a foreign sovereign.* We submit that the decision of the court below is correct. The basis of the rule that no statute of limitations binds the domestic or local sovereign unless it expressly so provides is the public policy that public rights or interests shall not be lost or curtailed by the failure of public servants to assert them promptly. *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437; *United States* v. *Nashville, etc., R. Co.*, 118 U. S. 120, 125; *United States* v. *Thompson*, 98 U. S. 486, 489; *United States* v. *Hoar*, 2 Mason 311, 313–

314, Fed. Cas. No. 15373. For the several following reasons, that policy is equally applicable to foreign sovereigns:

a. That policy is "applicable to all governments alike," *United States* v. *Nashville, etc., R. Co.*, 118 U. S. 120, 125, and it seems clear that the policy in purpose is equally applicable to public rights, whether asserted in foreign or in domestic courts.

b. Furthermore, for the courts of the domestic sovereign to deprive a foreign sovereign of this immunity, which has been called a "sovereign right or privilege" (*Dupont De Nemours & Co.* v. *Davis*, 264 U. S. 456, 462), and which is based on a public policy which in purpose applies equally to the domestic and foreign sovereign, would constitute a failure to accord to the foreign sovereign complete attributes of sovereignty, and would to that extent subject the foreign sovereign to local law. This result has always been prohibited. *United States* v. *Diekelman*, 92 U. S. 520, 524; *The Exchange*, 7 Cranch 116, 136; *French Republic and Board of Supervisors* v. *Jefferson County*, 200 Ky. 18, 252 S. W. 124, 125.

c. The foreign sovereign's immunity from a local statute of limitations is required by the public international policy of treating foreign and domestic sovereigns alike, which policy similarly results in other immunities to foreign sovereigns seeking remedies in the courts, such as immunity from taxation (*French Republic and Board of Supervisors* v. *Jefferson County, supra*), immu-

nity from interpleader or affirmative judgment without consent (*Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2d), and immunity from execution of judgment in an action in which a sovereign has consented to suit (*Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 F. (2d) 705 (C. C. A. 2d).

d. The several States have no power to pass statutes of limitations binding the United States, for the reasons, stated by this Court, that they cannot make the United States suable in the state courts (*United States* v. *Thompson*, 98 U. S. 486, 490) and have no jurisdiction over the United States (*Gibson* v. *Chouteau*, 13 Wall. 92, 99). For the same reasons the several States, which are not sovereign in the field of foreign relations, cannot bind foreign sovereigns by statutes of limitations.

4. *There is no conflict of decisions.* The petitioner asserts (p. 7) that the decision below is "contrary to the rule of decision indicated by this Court in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427." The opinion in that case, however, at page 437, expressly stated that application of the statute of limitations to a foreign sovereign "is a question which does not necessarily arise in this case, and as to which we are not called upon to express an opinion."

The petitioner asserts that the decision below conflicts with local New York decisions (p. 10) and that the court below disregarded cases concluding

that a foreign sovereign is barred by the statute of limitations (p. 17), citing *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 Fed. 533, 535–536 (C. C. Ky.); *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 1 S. E. 740; *United States* v. *Brown*, 247 N. Y. 211, 218; *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468.

In the *Buckner* case the court stated that the two-year limitation on suits against collectors to recover federal taxes applied to a municipality because the remedy was indirectly against the United States and the statute provided the conditions on which the United States consented to suit, and therefore must be complied with in every respect by everyone. In the *Miller* case the court stated that the plaintiff, a public corporation of Virginia, was subject to the same limitations as a natural person and then stated that, conceding the plaintiff and the Commonwealth of Virginia were one, the local limitation barred Virginia. The court remarked, however, that the local statute also barred the local sovereign. In neither of these cases was there involved the wholly different question decided by the court below of the application of a local statute of limitations, which does not bind the United States, to a claim by the United States obtained by assignment from a foreign sovereign.

In the *Royal Italian Government* case the records reveal that the question of whether the foreign

sovereign was exempt from the local statute of limitations was presented for the first time on a motion for reargument in the Appellate Division of the Supreme Court of New York after its decision and was not before that court when it made the judgment affirmed by the Court of Appeals without opinion. In the *Brown* case the court held that the United States was not bound by the local statute of limitations, and remarked at page 218: "Nor is it a case where another State or a foreign government comes to us for relief." That language is not a ruling in favor of the petitioner and, in so far as it places another State and a foreign government in the same category, is not in accord with the principles expressed in *United States* v. *Belmont*, *supra*.

The petitioner (pp. 7, 22–25) also asserts that the decision of the court below "is contrary to judicial practice throughout the world" and relies largely upon the argument that since in many countries, by statute, limitations run against the *local* sovereign, they should be considered to run against a foreign sovereign. It does not appear that any statute or instance referred to by the petitioner involved a limitation, binding upon a superior sovereign or a foreign sovereign, prescribed by a local government having no international status such as New York in the present case. The petitioner's assertion does not bear upon the correctness of the decision of the court below, which holds that where, as here, the local sovereign is exempt from

any statute of limitations of a local government, foreign sovereigns enjoy under international comity the same sovereign equality, and that in any event the local statute cannot bar a claim by the United States under the Litvinov Assignment. *United States* v. *Belmont, supra.*

Furthermore, it is by no means clear that the mere inclusion of the local sovereign in general statutes of limitations in some instances in some civil law jurisdictions is meant to bar the assertion of all public rights after the limitation has expired. The difficulty of accurate determination of proper judicial exceptions to general statutory provisions is one reason for the rule that such foreign law is not judicially noticed but must be proved as a fact with the aid of experts versed in the foreign law.

If reference is to be made to any foreign law it should be made to Soviet law alone because if exemption of a foreign sovereign from the local statute of limitations depends in any degree on the exemption granted to the United States abroad it should depend on the exemption granted by the law of the foreign sovereign involved here. The petitioner (p. 23) asserts that Soviet courts have held that the Soviet Government is barred by the general statute of limitations and cites Civil Code, Art. 44, and *Administration of Siberian Railroads* v. *Representative of the Supreme Council of People's Economy.* Art. 44 does not in terms refer to the Soviet State or Government but provides

limitations for private parties and between state institutions, enterprises, collectives, communal and cooperative organizations. In the *Siberian Railroads* case the court decided no more than that a special and specific one-year statute of limitations prescribed by Sections 101 and 102 of the Railroad Code, with respect to claims by railroads, applied. There was no question of the application of the general statute, Article 44 of the Civil Code.

Indeed the Soviet law appears to be well settled that the statute of limitations does not apply to suits by the Soviet State or any of its agencies to enforce public rights or to recover state property. *Explanation of Plenum of Supreme Court of R. S. F. S. R., Protocol No. 10, June 29,* 1925; *Harkomprod* v. *Mosselprom,* April 17, 1923, 2 Dec. V. A. K. (Supreme Arbitration Council) No. 98; *Saratov Gubkomotdel* v. *Riazan-Ural R. R.,* May 3, 1923, 3 Dec. V. A. K. No. 106.

Moreover, the extent of the immunity extended to a foreign sovereign is not limited by the extent of the sovereign immunity extended to the United States by the courts of the foreign sovereign. *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562.

In other common law jurisdictions as well as in the United States the local sovereign is exempt from the statute of limitations, *Lambert* v. *Taylor,* 4 B. & C. 138; *Brummel* v. *McPherson,* 5 Russ. 263, and the general sovereign immunity of the local sovereign from suit is extended to foreign sovereigns, *The Parlement Belge,* L. R. 5 P. D. 197,

210. It is submitted, therefore, that the court below correctly decided that a foreign sovereign is not bound by a statute of limitations which does not bind the domestic sovereign.

5. *No state statute of limitations can impede the consummation of the Litvinov Assignment.* The assignment is an executive agreement made in an exercise of the complete and exclusive power of the national government over international affairs and cannot be subjected to any curtailment or interference by the several States. *United States* v. *Belmont,* 301 U. S. 324, 331. That executive agreement is a treaty, in the international sense, and it has been recognized from the beginning that the preservation of the good faith of the United States in dealing with foreign nations requires that all such treaties must be superior to all state laws and policies. *United States* v. *Belmont,* 301 U. S. 324, 331; cf. *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 316, *et seq.*

In the present case, as in the *Belmont* case, it is sought to defeat the Government's claim and to dismiss the complaint on the ground that a local public policy, there the policy against confiscation and here the policy of the statute of limitations, was offended. The court below relied upon the *Belmont* case for its conclusion that the state statute of limitations cannot bar a foreign sovereign

and we submit that that decision clearly is correct under the *Belmont* case.[1]

CONCLUSION

The order below is interlocutory and is in accord with the applicable precedents. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

STANLEY REED,
Solicitor General.
SAM E. WHITAKER,
Assistant Attorney General.

DECEMBER 1937.

[1] The petitioner states (p. 14) that "It is established on authority not heretofore disputed that the claim, if barred in the hands of the State of Russia, was barred in the hands of the United States as its assignee." The respondent did and does dispute that assertion. The Soviet Government, the respondent's assignor, has been the Government of Russia since November 7, 1917, and no repudiation of the debt to begin the period of limitations was communicated to that Government. Moreover, apart from any application of the local statute of limitations to the Soviet Government if it sued on the claim, the acceptance of the assignment by the United States, as part of the executive agreement made in the exercise of the power over foreign relations, and suit by the United States, prohibits operation of the statute of limitations now against the domestic sovereign. The United States, in asserting a claim of that character, is not in the same position as a private party who is assignee of a private right after it is barred by limitations. *United States* v. *Belmont*, 301 U. S. 324. Cf. *Administrator of Hungarian Property* v. *Finegold* (K. B. Div.), 144 Law Times Reports 670.

APPENDIX

Assignment by the Soviet Government to the United States Government

Washington, *November 16, 1933.*

My Dear Mr. President:

Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the

settlement referred to above, not to make any claims with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

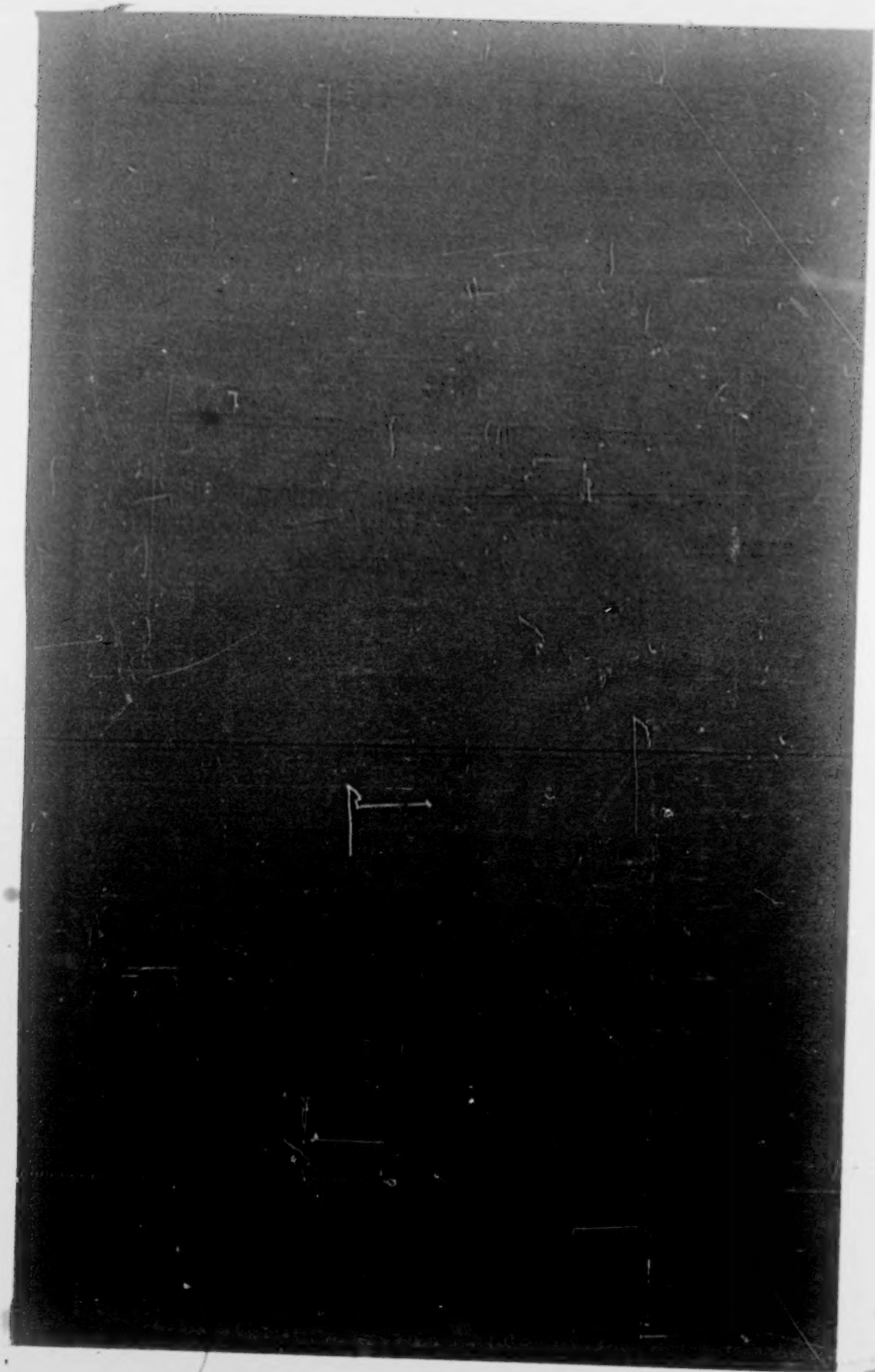
I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOFF,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

Mr. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

U. S. GOVERNMENT PRINTING OFFICE: 1937



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
International compact and statutes involved	3
Statement	3
Summary of argument	5
Argument:	
Introduction	10
Part One. Even if the owner of the bank deposit had no sovereign immunity the New York Statute of Limitations did not run	11
I. The petitioner failed to establish an unequivocal repudiation of the debt sufficient to start the period of limitations	12
A. The petitioner failed to establish an unequivocal refusal to pay the deposit	12
B. There is, at least, a conflict of evidence which requires a trial of the issue of unequivocal repudiation	29
II. No notice of repudiation, binding on the Soviet Government, was given	31
A. Notice of repudiation must be given to an authorised representative of the Soviet Government	32
B. Notice of repudiation to former representatives of the Provisional Russian Government was ineffective	33
III. The statute of limitations did not run because the Soviet Government was prevented from suing in our courts	47
Part Two. State statutes of limitations do not apply to foreign sovereigns	49
I. Under the Federal Rules of Decision Act a state statute does not apply in a law action by a foreign sovereign in a Federal court	50
II. A state statute of limitations cannot apply to a foreign sovereign	53
A. The New York Statute of Limitations is not intended to apply to foreign sovereigns	54
1. The terms of the statute do not include foreign sovereigns	54

Argument—Continued.
Introduction—Continued.
Part Two. State statutes of, etc.—Continued.
II. A state statute of, etc.—Continued.
A. The New York Statutes of, etc.—Con. Page
2. The reasons for exemption of local sovereigns from general statutes of limitations applies equally to foreign sovereigns. 58
3. The rule of international law that sovereigns in international tribunals are not bound by statutory limitations of municipal law supports the conclusion that the New York Statute was not intended to include foreign sovereigns..... 63
4. The rule of international law *that sovereigns are immune* from suit requires the interpretation that the New York statute did not intend to bind foreign sovereigns..... 67
5. The lack of power of a state to bind a foreign sovereign by limitations requires the construction that the New York statute did not intend to bind foreign sovereigns..... 78
B. New York lacks power to bind foreign sovereigns by statutes of limitations. 78
Part Three. The New York Statute of Limitations cannot bind the paramount domestic sovereign, the United States..... 82
I. Under the Federal Rules of Decision Act the New York Statute does not apply..... 83
II. Even if the Soviet Government's remedy is barred, the remedy of the United States is not barred..... 84
Part Four. The New York Statute of Limitations cannot bar the claim of the United States under an international compact..... 90

CITATIONS

Administrator of Hungarian Property v. *Finegold* (K. B. Div.), 144 L. T. 670..... 56, 87
Altman & Co. v. *United States*, 224 U. S. 583..... 92
Amy v. *Watertown*, No. 2, 130 U. S. 320..... 48
Asakura v. *Seattle*, 265 U. S. 332..... 92

	Page
Baker v. *Barclift*, 76 Ala. 414	48
Barbarie v. *Venezuela*, 4 Moore International Arbitration 4199	66
Barker v. *Conley*, 267 N. Y. 43	30
Barlow v. *Curtis*, 50 N. Y. 321	63, 79, 96
Baron Penedo v. *Johnson*, 29 L. T. 452	46
Bell v. *Morrison*, 1 Pet. 351	88, 89
Bell v. *Rowland's Admrs.*, 1 Hardin (Ky.) 301	87
Berrizzi Bros. Co. v. *The Pesaro*, 271 U. S. 562	67, 78
Billings v. *Hall*, 7 Calif. 1	76
Bowers v. *N. Y. & Albany Co.*, 273 U. S. 346	56
Bowman v. *Colfax*, 17 Wash. 344	76
Braun v. *Sauerwein*, 10 Wall. 218	48
Brenner v. *Quick*, 88 Ind. 546	48
Briggs v. *The Light-Ship*, 22 Allen (Mass.) 157	68
Buckner v. *Finley*, 2 Pet. 586	63, 93
Campbell v. *Holt*, 115 U. S. 620	85
Campbell v. *Muncie*, 246 App. Div. 632	30
Canadian Car & F. Co. v. *American Can Co.*, *253* Fed. 152	42, 55
Candish's Case, Sir William, 1 Plowden 321 (1529)	59
Carver v. *Adams*, 38 Vt. 500	85
Cayuga County v. *The State*, 153 N. Y. 279	47
Charming Betsy, The, 2 Cranch, 64	79
Ches. & Del. Canal Co. v. *United States*, 250 U. S. 123	85
Christmas v. *Russell*, 5 Wall. 290	48
Chy Lung v. *Freeman* et al, 92 U. S. 275	93
City Equitable Ins. Co., Matter of People, 238 N. Y. 147	41
Collac v. *Yugoslav State*, Annual Digest of Pub. Int. Law Cases (1929–1930), p. 196	64
Colombian Government v. *Rothschild*, 1 Sim. Ch. Rep. 94	46
Commissioners of the Sinking Fund of Louisville v. *Buckner*, 48 Fed. 533	74
Comegys v. *Vasse*, 1 Pet. 193	87
Cook, George W. (No. 2) Case, Annual Digest of Pub. Int. Law Cases (1927–1928), p. 264	64
Cooley v. *Board of Wardens of the Port of Philadelphia*, 53 U. S. 299	96
Cottonet et Cie v. *Raffalowitch* (France, Civil Trib. Seine, 18 Nov. 1907), 35 Clunet, Jour. de droit int. privé (1908) 153	46
Davis v. *Corona Coal Co.*, 265 U. S. 219	85
Dean v. *Hewit*, 5 Wend. (N. Y.) 257	28, 84, 89
Dexter & Carpenter v. *Kunglig Jarnvagsstyrelsen*, 43 F. (2d) 705	72
Dickinson v. *Del Solar* (1930), 1. K. B. 376	46
Dollar Savings Bank v. *United States*, 19 Wall. 227	57, 59
Exchange, The, 7 Cranch 116	8, 68, 70, 81
Fink v. *O'Neil*, 106 U. S. 272	61
First National Bank v. *California*, 262 U. S. 366	92
French Republic v. *Saratoga Vichy Co.*, 191 U. S. 427	61
Galanti v. *Brady & Gioe, Inc.*, 211 App. Div. 858	30

	Page
Ganley v. *Troy City National Bank*, 98 U. S. 487	86
Gans v. *Frank*, 36 Barb. (N. Y.) 320	85
Garfunkle v. *Malcolmson*, 217 App. Div. 632	
Gentinni Case, The, Ven. Arb. of 1903, 720	64
Giannavola v. *General Railway Signal Co.*, 244 App. Div. 65	30
Gibson v. *Chouteau*, 13 Wall. 92	61
Gouvernement espagnol v. *Veuve et Heritiers d'Aguado* (Paris, C. A.) Dallos (1867) II, p. 49	76, 77
Hanger v. *Abbott*, 6 Wall. 532	48
Harrison v. *Handley*, 1 Bibb (Ky.) 443	87
Hassard v. *United States of Mexico*, 29 Misc. (N. Y.) 511	68, 72, 73
Head's Executor v. *Manners, Admr.*, 5 J. J. March 255 (Ky.)	87
Helsering v. *Gouran*, 302 U. S. 238	53
Henderson v. *Mayor of N. Y.*, et al., 92 U. S. 259	53, 63, 80, 82, 96
Henry v. *Root*, 33 N. Y. 526	28, 88
Herzog v. *Brown*, 217 App. Div. 402	6, 30
Hobart v. *Connecticut Turnpike Co.*, 15 Conn. 145	48
Holmes v. *Jennison*, 14 Pet. 540	79, 80, 96
Hopkirk v. *Bell*, 3 Cranch. 454	94
Horlick v. *Horlick*, 243 App. Div. 559	30
Hulbert, et al., v. *Clark, et al.*, 128 N. Y. 295	85
Jackson v. *Lamphire*, 3 Pet. 280	48
Jacobun v. *Colgate*, 217 N. Y. 235	48, 49
Jaudon v. *Societe de l'Industrie Chimique*, Annual Digest of Pub. Int. Law Cases (1929–1930), No. 73	35
Koshkonong v. *Burton*, 104 U. S. 668	48
King and Gracie, Case of, Great Britian Claims Proceedings, p. 305	64
King v. *Marrall*, 6 Price 24	89
Kingdom of Roumania v. *Guaranty Trust Co.*, 250 Fed. 341	72, 78
Lamb v. *Powder River Live Stock Co.*, 132 Fed. 434	49
Leavitt v. *Dabney*, 37 How. Pr. (N. Y.) 264	78
Lehigh Valley R. Co. v. *State of Russia*, 21 F. (2d) 396	31, 42, 44, 55
Lightfoot v. *Davis*, 198 N. Y. 261	9, 34
Lottawanna, The, 21 Wall. 558	63, 79
Luther v. *Sagor* (1921), 3 K. B. 532	33
MacKenzie v. *Hare*, 239 U. S. 299	92
Magdalen College Case, 11 Co. Rep. 66b (1616)	59
Manning v. *Nicaragua*, 14 Howard's Practice (N. Y.) 517	68
Maryland v. *West Virginia* (1909), 217 U. S. 22	65
McEldowney v. *Wyatt*, 44 W. Va. 711	85
McIver v. *Ragan*, 2 Wheat. 25	48
Missouri v. *Holland*, 252 U. S. 416	92
Mohamed v. *Unifruitco S. S. Co.*, 223 App. Div. 791	30
Monaco v. *Mississippi*, 292 U. S. 313	92
Mossman, The, 4 Moore Int. Arbitration, p. 4180	64
Muir, Ex parte, 254 U. S. 532	46

Page

Nardone, et. al, v. *United States*, No. 190, decided Dec. 20, 1937, Pamp. 3–4 57
Nazare Agha v. *Galezowski*, 39 Clunet (1907), 1133 46
Nereide, The, 9 Cranch, 338 79
New Hampshire v. *Louisiana*, 108 U. S. 76 74
Norske-Lloyd Ins. Co., Matter of People, 242 N. Y. 148 41
Northern Insurance Co., Matter of People, 262 N. Y. 453 41
Oetjen v. *Central Leather Co.*, 246 U. S. 297 ..... 6, 33
Oliver Co. v. *Mexico*, 264 U. S. 440 79
Orman v. *Van Arsdell*, 12 N. Mex. 344 85
Oswego & Syracuse R. R. Co. v. *State*, 226 N. Y. 351 ..... 7, 47
Panama R. R. Co. v. *Johnson*, 264 U. S. 375 78
Parlement Belge, The, 5 P. D. 197 (C. A. 1878) 68, 70
Parmenter v. *State*, 135 N. Y. 154 47
Penza, The, 277 Fed. 91 ..... 7, 47
People v. *Dennison*, 84 N. Y. 272 68
People v. *Gilbert*, 18 Johns. (N. Y.) 227 56
Perloff v. *Kelmenson*, 226 App. Div. 696 30
Phelps v. *McDonald*, 99 U. S. 298 87
Phillips v. *Commissioner*, 283 U. S. 589 ..... 85, 87
Pious Fund of the Californias, The, For. Rel., 1902, App. II, p. 63 64
Preobazhenski v. *Cibrario*, 192 N. Y. Supp. 275 47
Press v. *Draper*, 139 Misc. 263 30
Putnam v. *Dike*, 79 Mass. 535 85
Reichenbach et Cie v. *Mme Ricoy* (France, Civil Trib. Seine, 4 April 1906), 34 Clunet, Jour. de droit int. privé (1907) 111 46
Ricaud v. *American Metal Co.*, 246 U. S. 304 33
Rizzuto v. *U. S. Shipping Board Emergency Fleet Corp.*, 213 App. Div. 326 30
Rogers, Matter of, 153 N. Y. 316 86
Rogdai, The, 278 Fed. 294 47
Royal Italian Government v. *International Comm. of Y. M. C. A.*, 273 N. Y. 468 75
Russian Government v. *Lehigh R. Co.*, 293 Fed. 133 42
R. S. F. S. R. v. *Cibrario*, 235 N. Y. 255 ..... 7, 47
Salimoff v. *Standard Oil Co.*, 262 N. Y. 220 34
Sarropoulos v. *Etat Bulgare*, Annual Digest (1927–1928), p. 263 64
Senninger v. *Rowley*, 138 Iowa 617 76
Silverman v. *National City Bank of New York*, 133 Misc. 201 13
Sorrels, Admr., v. *Trantham, Admr.*, 48 Ark. 386 48
South Dakota v. *North Carolina*, 192 U. S. 286 ..... 9, 86, 89
Spader, Ven. Arb. of 1903, 161 64
State of Russia v. *Bankers Trust Co.*, 4 F. Supp. 417 ..... 41, 43
State of Russia v. *National City Bank of New York*, 69 F. (2d) 44 .....
State v. *County of Kings*, 125 N. Y. 312 92
Stockwell v. *Bates*, 10 Abb. Pr. (N. S.) (N. Y.) 331 ..... 73, 78
Stoughton v. *Baker*, 4 Mass. 521 ..... 56, 60
Suarez v. *Suarez* (1918), 1 Ch. 176 46

Page

Tarbell v. *Grand Trunk Ry.*, 94 Vt. 449 86
Tarble's Case, 13 Wall. 397 92
Taylor v. *Morton*, 2 Curtis 454 92
Terry v. *Anderson*, 95 U. S. 628 48
Tillman v. *Guaranty Trust Co.*, 253 N. Y. 295 ..... 6, 13, 24
Townsend v. *Jemison*, 9 How. 407 77
Underhill v. *Hernandez*, 168 U. S. 250 33
United States v. *Belmont*, 301 U. S. 324 ..... 10, 31, 32, 55, 75, 90, 91, 92, 93, 94, 95, 96
United States v. *Brown*, 247 N. Y. 211 74
United States v. *Buford*, 3 Pet. 12 ..... 87, 88, 89, 90
United States v. *Chesapeake & O. Canal Co.*, 206 Fed. 964 43
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304 ..... 9, 53, 63, 79, 80, 92, 95
United States v. *Hoar*, 2 Mason's Rep. 311 ..... 9, 50, 51, 52, 56, 57, 59, 63, 82, 83
United States v. *Kirkpatrick*, 9 Wheat. 720 61
United States v. *Knight*, 14 Pet. 301 61
United States v. *Nashville &c R'y Co.*, 118 U. S. 120 ..... 61, 62
United States v. *National City Bank of New York*, 83 F. (2d) 236 41
United States v. *President and Directors of the Manhattan Co.*, 276 N. Y 41
United States v. *Rauscher*, 119 U. S. 407 ..... 53, 79, 80, 81, 96
United States v. *Thompson*, 98 U. S. 486 ..... 8, 9, 50, 61, 63, 72, 81, 82, 83
United States v. *Whited & Wheeless*, 246 U. S. 552 86
United States v. *Wiley*, 11 Wall. 508 48
Waltermire v. *Westover*, 14 N. Y. 16 ..... 28, 84
Ware v. *Hylton*, 3 Dal. 199 94
Warner v. *Buffalo Dry Dock Co.*, 67 F. (2d) 540 85
Western Lunatic Asylum v. *Miller*, 29 W. Va. 326 (1897) 73
Williams Case, The, 4 Moore Int. Arb. 4181 64
Wilson v. *Iseminger*, 185 U. S. 55 48
Wooster v. *Scorse*, 16 Ariz. 11 76
Workman v. *New York City Mayor &c*, 179 U. S. 552 63
Wulfsohn v. *Russian Socialist Republic*, 234 N. Y. 373 34

STATUTES AND EXECUTIVE AGREEMENT

Statutes:

Rules of Decision Act., Rev. Stat., Sec. 721 (U. S. C., Title 28, Sec. 725) 50, 83
Civil Practice Act of the State of New York:
Sec. 15 98
Sec. 15 (2) 98
Sec. 24 48
Sec. 48 (1) 55
Sec. 54 55
Sec. 977 b, Subsec. 18 ..... 55, 85

Statutes—Continued.

	Page
Rules of Civil Practice:	
Rule 107, Subdiv. 6	29
Rule 108	30
Executive Agreement, pp. ——.	
Miscellaneous:	
Bacon's Abridgment, Prerogative E 6 (1736)	59
Blackstone's Commentaries, Vol. I, p. 247 (Cooley's 4th Ed.)	59
Borchard Diplomatic Protection of Citizens Abroad, p. 829, 830	64, 66
Bracton, DeLegibus Liber, II c. 5, Sec. 7 (Circa 1350)	56, 59
Combined Annual Reports of the (U. S.) World War Foreign Debt Commission, 1922–1926, p. 87	
Dickinson, Unrecognized Governments, 22 Mich. L. R. 118	34
Fauchille, Traité de droit—international public (8th ed. 1926), Tome 1, 3ème partie, p. 69	47
Federalist, The, 512, No. 82	
Fenwick, International Law (2d. ed.), pp. 75ff	96
Harvard Law School, Research in International Law, "Diplomatic Privileges and Immunities (1932), Special Supplement 26 American Journal of International Law (1932), 125 ff	47
Hudson, Cases on Int. Law (2d ed. 1936)	55
Instructions to Diplomatic Officers of the United States (1897), Sec. 46, p. 18	47
Instructions to Diplomatic Officers of the United States (1927) Ch. VII, Sec. 1	47
Journal du Palais, 1869, p. 118	76
Kluber Droit de Gens, Sec. 125	64
Lauterpacht, Private Law Sources and Analogies of International Law, pp. 118–119 (1927)	64
Marten's Droit de Gens, Sec. 70, 71	64
Mix, State Statutes of Limitations, 3 Rky Mt. L. R. 106	63, 82
Moore's Digest of International Law, Vol. 1, Sec. 88; Vol. 6, p. 1002	65, 66
Morton, Les Privileges et immunities diplomatiques (1927), 147	47
Ogdon, Juridical Bases of Diplomatic Immunity (1936) 133 ff	47
Oppenheim, International Law (5th ed.) vol. 1, Sec. 23	92, 96
Pomeroy, Lectures on International Law, Sec. 111, pp. 125–127	64
Pradier-Fodere, Cours de droit diplomatique (2d ed. 1899) vol. 2, p. 152	46
Ralston, Supplement to the Law and Procedure of International Tribunals (1936), p. 185	64
Willoughby, Constitutional Law, (2d. ed. 1929), vol. I, Sec. 320	96
Wood on Limitations (4th ed.) 17	48

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
PETITIONER

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 257–274) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 281–291) is reported in 91 F. (2d) 898.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered August 23, 1937 (R. 292). The petition for a writ of certiorari was

filed November 9, 1937 (R. 293), and was granted December 13, 1937 (R. 293). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does the record disclose the unequivocal repudiation necessary to begin the operation of the New York statute of limitations. In any event, does the record disclose an issue of fact to be tried on this question of unequivocal repudiation.

2. If there was an unequivocal repudiation, was notice of the repudiation, sufficient to bind the owner of the deposit, given.

3. Did the statute of limitations run during the period in which the Soviet Government was barred from suing in our courts.

4. Is the New York statute of limitations intended to run against a foreign sovereign, and, if so, has New York power to enact such a statute.

5. Under the Federal Rules of Decision Act, is the New York statute of limitations applicable in a law action by a foreign sovereign in a Federal court.

6. Under the Federal Rules of Decision Act is the New York statute of limitations applicable to this action by the United States in a Federal court.

7. May a statute of limitations be invoked to defeat a claim asserted by the United States, even

though the remedy may have been barred in the hands of its assignor.

8. May a claim asserted by the United States under the international compact with the Soviet Government be defeated by a state statute of limitations.

INTERNATIONAL COMPACT AND STATUTES INVOLVED

The applicable international compact and statutes are set forth in the Appendix, *infra*, pp. 98–118.

STATEMENT

On or about July 15, 1916, the Imperial Government of Russia deposited with petitioner the sum of $25,000,000 in the name of the Foreign Section of its Ministry of Finance (R. 3, 227). Withdrawals on this account were to be made by cable, confirmed by a letter bearing two signatures authorized by the Ministry of Finance (R. 228–229, 248–253). This account was under the direct control of the Ministry of Finance, and supervision thereof was never entrusted to any diplomatic representatives of any government of Russia in the United States (R. 157, 175).

On March 16, 1917, the Imperial Government of Russia was overthrown, and was succeeded by the Provisional Government of Russia, which was recognized by the United States on March 22, 1917 (R. 216–217).

On January 23, 1917, Mr. Serge Ughet was designated as the representative of the Ministry of

Finance with the Russian Supply Committee in the United States (R. 116), and on April 4, 1917, was appointed as Financial Attaché of the Russian Embassy (R. 185).

On July 5, 1917, Mr. Boris Bakhmeteff was officially received by the President as the Ambassador of Russia (R. 217).

On July 2, 1917, the account in question being overdrawn, the sum of $5,000,000 was deposited with the petitioner by Ughet on July 12, 1917, acting under orders of the Ministry of Finance, by transfer of funds from the Russian Government account in the National City Bank (R. 80, 110–111, 175).

On November 7, 1917, the Provisional Government was overthrown, and was succeeded by a government which is now known as the Union of Soviet Socialist Republics, hereinafter referred to as the Soviet Government (R. 217). At the time the Provisional Government was overthrown, there remained on deposit in the account the sum of $4,976,722.78 (R. 3).

On November 28, 1917, the Soviet Government dismissed Bakhmeteff and Ughet as Ambassador and Financial Attaché, respectively (R. 187, 217–218), but the United States continued to recognize Bakhmeteff as Ambassador until he withdrew at the invitation of the State Department on June 30, 1922. Thereafter, and until November 16, 1933, Ughet was recognized as custodian of Russian property in the United States (R. 246, 258).

On November 16, 1933, the United States recognized the Soviet Government, and on that date the fund in question was assigned by that Government to the United States.

After the United States had made demand upon the petitioner for payment of the sum in question (R. 4), on September 21, 1934 it instituted this action (R. 1). Petitioner thereafter moved to dismiss the complaint on the ground that the statute of limitations had run, submitting in support thereof numerous affidavits and two depositions (R. 4–6). The United States in turn submitted a number of affidavits and exhibits in opposition to the motion.[1]

On November 2, 1936, the District Court sustained the motion to dismiss (R. 274–276). On appeal, the Circuit Court of Appeals reversed, one judge dissenting without an opinion (R. 281–291).

SUMMARY OF ARGUMENT

The respondent contends that a decision in its favor on any one of the eight questions presented will determine this case for it and that the petitioner, to prevail, must establish that all of these questions should be determined in its favor.

---

[1] There is sharp dispute between petitioner and the United States on the question of an unequivocal repudiation of the debt by the petitioner, to be drawn from the various affidavits and exhibits. The question is discussed in Part One of the Argument, *infra*.

Part One

I. Apart from sovereign immunity of the Soviet Government and of the United States Government from the bar of the New York statute of limitations, the period of limitations did not begin. The District Court erroneously determined that the petitioner had made the unequivocal refusal to pay the deposit necessary to start the period of limitations. *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295. The correct determination from all the evidence is that the petitioner did not make an unequivocal refusal to pay, but even if some of the evidence supported the District Court's conclusion, an issue of fact was created by all the evidence which required that the question of fact should not be determined on a motion to dismiss the complaint on affidavits and depositions. The respondent is entitled to trial on this issue of fact. *Herzog* v. *Brown*, 217 App. Div. 40.

II. The period of limitations did not begin because no notice of any repudiation which the petitioner may have made was given to the owner of the bank deposit or to any one of its authorized agents. Diplomatic recognition of the Soviet Government validates its acts from the beginning of its existence. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297. The Soviet Government became owner of this Russian Government bank deposit when it succeeded the former Provisional Government of Russia on November 7, 1917. No notice of repudia-

tion was given to any representative of the Soviet Government. Notice to Boris Bakhmeteff, Ambassador of Russia under the former Provisional Government of Russia, and to Serge Ughet, Financial Attaché of the Russian Embassy under that Government, did not commence the period of limitations because their status in the United States after November 7, 1917, did not make notice to them binding upon the Soviet Government, the owner of the deposit. Neither of them at any time had supervision or control of this account. Their diplomatic status here was continued by our Government for the purpose of liquidating war contracts in the interest of American manufacturers and bondholders of Russian securities, and does not serve as a basis for the contention that notice of repudiation to them binds the owner of the bank deposit.

III. During the entire period in which the petitioner claims that the period of limitations ran, the Soviet Government was barred from suing in our courts, although it attempted to do so. *R. S. F. S. R.* v. *Cibrario,* 235 N. Y. 255; The Penza, 277 Fed. 91 (E. D. N. Y.). The New York statute of limitations does not run against a plaintiff who has no forum in which to assert its rights. *Oswego & Syracuse R. R. Co.* v. *State,* 226 N. Y. 351, 360.

Part Two

Even if the New York statute would have run against a private owner of this bank deposit, and

even if the United States is in no better position than the Soviet Government, the statute did not run in this case because it is not applicable to a foreign sovereign.

I. Congress did not intend in the Rules of Decision Act (R. S. Sec. 721) that a state statute of limitations could be asserted as defense in an action in a federal court by either the United States (*United States* v. *Thompson,* 98 U. S. 486) or a foreign sovereign which the United States recognizes as its equal. *The Exchange,* 7 Cranch 116.

II. Even if the Soviet Government had instituted this law action in a New York state court, the statute of limitations would not be a bar because it was not intended to apply to foreign sovereigns. The statute does not expressly include foreign sovereigns. The United States is exempt from the statute. *United States* v. *Thompson, supra.* Similarly, foreign sovereigns are exempt. The doctrine of laches, applicable in international tribunals to prevent stale claims, is the only limitation of time applicable to sovereigns. Under public international law, foreign, as well as domestic, sovereigns are immune from suits in the federal and state courts of this country without their consent. The principle of equality of sovereigns upon which this immunity is based requires that foreign sovereigns shall not be subject to state statute of limitations, which do not bind the United States. *United States* v. *Thompson, supra.* The state statute will not be given a construction, not required

by its terms or by any state court decisions, which would depart from the principle of equal treatment of the United States and foreign sovereigns in our courts.

If the New York statute be construed to bind foreign sovereigns, it is invalid in that respect, because it is an invasion of the field of foreign relations, which is exclusively a matter of national concern. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

Part Three

Even if a foreign sovereign is bound by state statutes of limitations, the plaintiff in this action, the paramount domestic sovereign, is not subject to the New York statute of limitations.

I. Under the Federal Rules of Decision Act, the state statute of limitations is not a rule of decision in this action by the United States in a federal court, *United States* v. *Thompson*, 98 U. S. 483; *United States* v. *Hoar*, 2 Mason 311 (C. C. Mass.).

II. The New York statute bars the remedy in the New York courts but does not extinguish the right to the bank deposit. *Lightfoot* v. *Davis*, 198 N. Y. 261, 264. An unenforceable debt may become enforceable by assignment. *South Dakota* v. *North Carolina*, 192 U. S. 286. Therefore, even though the Soviet Government had no remedy, the United States has a remedy because it cannot be barred by the New York statute of limitations.

Part Four

The New York statute cannot impede consummation of the international compact which is the basis of this action. *United States* v. *Belmont*, 301 U. S. 324. The exclusive national power over foreign relations was exercised in this agreement without regard to various state statutes of limitations. The equal sovereign contracting parties did not intend that state statutes of limitations, which cannot bind the United States, should impede the consummation of the compact.

ARGUMENT

INTRODUCTION

The petitioner argues in its brief that the New York statute of limitations barred the claim here involved before it was assigned to the United States (Point I, pp. 13–71); that the assignment to the United States did not revive the claim (Point II, pp. 71–83); and that the assignment did not override the state statute of limitations (Point III, pp. 83–91).

The respondent contends that, even apart from sovereign immunity, no unequivocal repudiation sufficient to start the period of limitations was made, or, if made, was not communicated to an authorized agent of the owner of the deposit (Part One, pp. 11–49, *infra*); that the New York statute of limitations is not intended to and can not apply to foreign sovereigns (Part Two, pp. 49–82, *infra*);

that the statute cannot bar the claim of the United States even though the remedy of its assignor may be barred (Part Three, pp. 82–90, *infra*); that the state statute cannot defeat enforcement of this claim asserted by the United States under the international compact known as the Litvinov assignment (Part Four, pp. 90–97, *infra*).

The respondent submits that the petitioner must fail unless it prevails on each one of the eight questions presented.

Part One

Apart from sovereign immunity the statute of limitations did not run

It is assumed, solely for the sake of Part One of this argument, first, that the United States, as assignee, has no greater rights than its assignor, and second, the Soviet Government, as its assignor, has no greater rights than a private citizen suing for a bank deposit. The respondent contends that the statute of limitations did not run because: (I) The petitioner did not establish that it had made an unequivocal refusal to pay the deposit; (II) no notice of refusal to pay the deposit was given to any authorized agent of the owner of the deposit; and (III) the owner of the deposit was prevented from suing in any of the courts of this country during the entire period in which it is claimed that the statute of limitations ran.

I

The petitioner failed to establish an unequivocal repudiation of the debt sufficient to start the period of limitations

The respondent contends (A) that the petitioner failed to establish in the District Court that it had unequivocally refused to pay the debt, and (B) that even if there was some evidence of an unequivocal repudiation, there was, at least, a denial of the fact of an unequivocal refusal and evidence which created an issue of fact on this question which requires a trial of this issue.[2]

A. The petitioner failed to establish an unequivocal refusal to pay the deposit

It is the rule that an unequivocal refusal to pay a bank deposit gives rise to the cause of action

[2] The District Court concluded (R. 260) that there was an unequivocal repudiation. The Circuit Court of Appeals in its opinion did not consider the question at all, and the basis of its decision, that the statute of limitations does not run against a foreign sovereign in this case, made it unnecessary to consider this question. The petitioner argues (Brief, p. 11) that the Circuit Court of Appeals, in holding that the statute does not run against a foreign sovereign, could not "have arrived at that question without first coming to the conclusion that the District Court was right in finding that there was no triable issue with respect to the accrual of a cause of action. If there had been a triable issue in that respect, the Circuit Court of Appeals would have sent the case back for trial." Respondent submits that just the converse is true, and that the Circuit Court of Appeals intentionally refrained from ruling on the question of fact, because such a ruling was unnecessary for the decision.

which starts the period of limitations. *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295. The respondent contends that the fact of an unequivocal refusal to pay must be clearly expressed in the conduct of the petitioner *taken as a whole* before it will be charged with, or entitled to rely upon, a repudiation of its obligations or denial of its liability. *Silverman* v. *National City Bank of New York*, 133 Misc. 201, 208–209.

The District Court took the view, expressed in its oral opinion (R. 257–276), that the evidence, consisting of depositions, affidavits, and exhibits, established without a dispute requiring a trial, that the petitioner unequivocally repudiated liability as early as February 25, 1918, when it created the consolidated Russian account (R. 260) discussed below, and that to all inquiries or demands concerning the deposit, the petitioner unequivocally replied that it repudiated liability (R. 267).[3]

An examination of its opinion discloses that the District Court devoted the greater part of its attention and discussion to the question of *notice* of repudiation and apparently thought that the question of *existence* of repudiation was not seriously disputable. The respondent always disputed it seriously and submits that the District Court, in

[3] The District Court properly recognized in its opinion (R. 268) that its view of the facts adopted in determining this motion did not purport to constitute findings of fact restricting appellate review, in the sense of findings of fact after trial.

reaching its conclusion on the existence of an unequivocal repudiation, relied, erroneously, on the isolated fact of the consolidation of the Russian accounts and the facts of refusal to pay the account to persons unauthorized by the owner of the account, as establishing an unequivocal refusal.

The District Court apparently considered the facts of this case as if it concerned an ordinary private commercial transaction involving an unambiguous setoff by a bank in the routine course of banking business under normal political and business conditions. In this we submit the District Court was grievously in error. The alleged setoff and refusals to pay unauthorized persons must be viewed, not as isolated acts, but in the light of the unusual political situation which existed and motivated the petitioner's conduct, and as part of the web of connected circumstances which limit and explain the qualified, tentative, and equivocal nature of the conduct alleged to have constituted a definite repudiation beyond dispute.

An evaluation of the meaning of all the circumstances disclosed even by this record by affidavits and depositions in a summary proceeding without trial, discloses that the petitioner, merely as a matter of careful business practice, refused to pay the deposit over to persons not authorized to draw upon it, and balanced its claims against the Ministry Account, not with the intention of appropriating that account, but conditionally and tentatively, pending negotiations with a stable govern-

ment whenever one should become established in Russia and should be recognized by the United States. An examination of the facts discloses the vice inherent in the District Court's method of considering isolated acts of the petitioner without considering the circumstances which explain, limit, and qualify them.

In July, 1916, this bank account was opened by the Imperial Russian Government by a deposit of $25,000,000 which was part of the proceeds of a loan or credit of $50,000,000 to that Government by a group or syndicate of New York banking firms, including the petitioner. The purpose of the loan or credit was to enable the Russian Government to purchase and pay for war supplies in this country for use in the World War then being waged.

The account bore the title "Section Etrangere Ministere des Finances", the Foreign Section of the Ministry of Finance of that Government. Withdrawals from the account were to be made only by cable from the Ministry of Finance bearing a code test number, confirmed by letters bearing two signatures authorized by the Ministry (R. 228–229, 248–253). This account was in the exclusive control of the Ministry of Finance, and the right to withdraw from, or to supervise, the account was never committed to diplomatic or consular representatives in the United States of the Russian Government (R. 157, 175).

On March 16, 1917, the Imperial Government was succeeded by the Provisional Government, which was diplomatically recognized by the Government of the United States on May 22, 1917 (R. 216–217). Mr. Serge Ughet, designated on January 23, 1917, as the representative of the Ministry of Finance with the Russian Supply Committee in the United States (R. 116), was appointed Financial Attaché of the Russian Embassy on April 4, 1917 (R. 185). On July 5, 1917, Mr. Boris Bakhmeteff was received by the President of the United States as Ambassador of the Provisional Government of Russia (R. 217).

From time to time withdrawals were made from the account in the authorized manner (R. 229) but never in any other manner. On July 2, 1917, the account was overdrawn. On July 10, 1917, the last payment was made by the petitioner out of the account (R. 230). On July 12, the account was credited by a deposit of $5,000,000 made by Ughet in the form of a transfer from the Russian Government account at the National City Bank, upon order from the Ministry of Finance (R. 80, 110–111, 175). The last letter, dated June 21, 1917, from the Ministry with respect to the account was received by the petitioner on August 25, 1917, but the record does not disclose its contents (R. 229–230).

On November 7, 1917, the Provisional Government was overthrown and succeeded by a government which later came to be known as the Union of Soviet Socialist Republics.

By a decree dated November 26, 1917, Bakhmeteff, as well as all other "ministers, members of missions, et cetera, of the Russian Republic" averse to the Soviet Government were dismissed by it from their posts and deprived of any right to perform any State duties or to make payments from State funds (R. 187, 217–218). The United States Government was officially informed of this by its Ambassador to Russia, Mr. David R. Francis (R. 189–218). On June 5, 1918, Mr. Maxim Litvinov was designated by the Soviet Government as its plenipotentiary representative in Washington. Ambassador Francis communicated this fact to the United States Government (R. 182, 218). On March 18, 1919, Mr. Ludwig Martens presented to the Department of State his credentials as representative of the R. S. F. S. R. in the United States (R. 190–191; 218).

It is in connection with these political events and the explicit instructions to the petitioner that withdrawals on the deposit were to be made only by cable and letter from the Ministry of Finance, that the conduct of the petitioner, now asserted to have constituted an unequivocal refusal to pay the debt, must be weighed.

A notation under the date of November 10, 1917, appears on the Finance Ministry account in the form of a notice to allow no withdrawals but to refer to two named officers of the petitioner (R. 80).

Early in December 1917, Ughet left with the petitioner (R. 196) for its consideration a copy of a letter dated November 28, 1917 (R. 107–108) from

Bakhmeteff to the National City Bank of New York declaring that all moneys in that bank standing at his disposal and against which he was authorized to draw (R. 213) should be placed in a new account in his official name and held in trust to pay orders and contracts theretofore placed for supplies for the Russian Army and Navy and other purposes. In a letter dated December 12, 1917, the President of the petitioner, Charles H. Sabin, wrote Ughet that there were no moneys on deposit with the petitioner standing at the disposal of Bakhmeteff, but that there was, however, on deposit with the petitioner, an account standing to the credit of the Ministry of Finance, which was customarily paid only upon the signatures of two of certain designated officials of the Ministry. This letter (R. 108–109) concluded:

> * * * Under present conditions, we do not see how we can honor such cable instructions, nor do we see how we could honor written orders signed by the persons previously designated to draw on this account, without the assurance of our Government that such persons still have authority to act. Nor have we any authority for the transfer of these funds. We must, therefore, for the present continue to hold these funds to the credit of such account.[4]

---

[4] Concerning this letter, the District Court said (R. 261): "That, as it seems to me, was not an unequivocal denial of liability by the bank."

Later in December, 1917 or early in January, 1918, Ughet and Sabin conferred at the Department of State in Washington with Mr. Frank R. Polk, Counselor for the State Department. Ughet testified that in answer to Polk's question whether the petitioner would release the deposit to the Russian Embassy, Sabin "pointed out that because the Guaranty Trust Company was having certain claims against Russia in consequence of November events of 1917, that the Guaranty Trust Company, therefore, was not feeling at liberty to release this fund to the jurisdiction of the Russian Embassy" (R. 14). In a letter dated January 31, 1918, to Polk, Sabin enclosed a copy of his letter dated December 12, 1917, and stated: "We have never been authorized to honor checks drawn on this account [the Ministry Account] by Russian officials in this country" (R. 196). Bakhmeteff testified positively (R. 68) that he himself had never attempted to obtain the fund from the petitioner, and had never seen any of the petitioner's officials concerning it.

On February 25, 1918, the petitioner's Russian accounts were consolidated into a single "Russian Government Account" to avail of the Ministry Account to pay the petitioner's alleged claim against the Russian Government for the dollar value of its ruble balance with former Russian private banks. As part of the transaction the Finance Ministry Account was closed by entering on the debit side thereof the exact balance appearing on the credit

side. When the officials of our Government learned of this consolidation in May 1918,[5] they expressed their disapproval of the action (R. 201), and our Government refused to acquiesce in the transaction in any manner (R. 129–130).

A year later, in answer to a letter from Polk dated June 4, 1919 (R. 201–202) concerning the desirability of using a portion of the Ministry Account to meet an interest payment due on the Russian Government loan on July 10, 1919, Sabin replied in a letter dated June 9, 1919 (R. 105–107):

> We hold the deposit for account of 'the Russian Government,' and *shall be under the duty to account for this deposit to a regular and responsible Russian Government whenever such a government is established and calls upon us to pay it or to apply it according to its direction. In the meantime we can only hold it.* We consider that we have no more right or authority to use it now to pay interest on the bonds of a certain Russian loan than we should have to apply part or all of the deposit of any individual with us to the payment of such individual's debts upon our own initiative. *Our action in*

[5] The Government was informed of the consolidation by a letter to the Treasury Department written on May 7, 1918, by Penny, an official of the Federal Reserve Board (R. 200–201). An examination of this letter utterly fails to support the District Court's conclusion (R. 263) that it recited the "notice of repudiation as having been given by Breton to Ughet."

using part of this deposit for such purpose might be disapproved by a future Russian Government.

* * * At that time [early in 1918] we had accounts, including large deposits, in the Russian commercial banks in Russia. Under the circumstances, we considered it necessary and proper to consolidate the Russian Government account and the accounts of the Russian commercial banks, the result being, according to our computation, a credit balance in our favor. This situation, as you will readily understand, gives rise to certain questions which can be satisfactorily settled only upon the restoration or establishment of a responsible government in Russia, when undoubtedly all of them, in so far as they concern American financial interests, will, with the aid of our Government, be properly disposed of. In the meantime, however, as we regard it, both in considering the Russian Government account by itself, *and in considering the consolidated account referred to, any payment made by us now would leave us in a position where we might be required to pay the same amount again.* [Italics supplied.]

This letter, in which the reference to the consolidation of the Russian accounts is coupled with the admission of the petitioner's duty to account for the deposit to a recognized Russian Government, discloses that the petitioner had not made, and did not consider that it had made an unequivocal repudiation.

On July 2, 8, and 11, 1919, meetings of a committee of representatives of the participants in the Russian Government $50,000,000 credit were held (R. 116–126). At the first meeting the chairman of the committee, Mr. John H. Fulton, of the National City Bank of New York, presented a letter from Ughet to him dated July 1, 1919 (R. 121), proposing a request by the committee to the petitioner to release $1,625,000 of the Ministry Account to pay interest on the credit.[6] Fulton sent a copy of the Ughet letter to the petitioner, and a reply dated July 10, 1919, was presented to the committee meeting on July 11, 1919. This reply, signed by Sabin, stated in part (R. 123):

> I wish to state, as I have previously stated, that no one now has authority to draw Russian funds on deposit in this bank, therefore we can not act upon Mr. Ughet's suggestion.

There was enclosed with this reply, a copy of which was sent to Ughet, a copy of the letter of June 19, 1919, from Sabin to Polk discussed above.[7]

---

[6] The District Court erroneously construed this letter as a request to Fulton to do what in law amounts to a demand for a turning over by the defendant bank of $5,000,000 deposit account (R. 264). The letter reveals no more than a proposal for the consideration of the protective committee that it should ask the petitioner to release $1,625,000 in order to pay the interest due.

[7] An affidavit of Harold Stanley, vice-president of the petitioner in 1918 and 1919, alleges that he, on behalf of the petitioner, attended a meeting of representatives of

At about the same time another type of negotiation respecting the Ministry Account was in progress between counsel for the petitioner and counsel for the Russian Embassy. The substance of these negotiations can be gathered from a number of letters and memoranda (R. 111–113, 131–151) which indicate that for a period of several months the petitioner expressed uncertainty as to whether it should pay over the account, an uncertainty based largely upon its doubt of the authority of the Russian officials in this country to dispose of this fund. At one time the petitioner's counsel stated that the petitioner felt that the situation with regard to this account was such that it "can not be settled until there is a staple government in Russia," for the reasons that it had in commercial banks in Russia taken over by the *de facto* Russian Government credits exceeding the credit with it by the Provi-

---

the interested banking group shortly before the Russian credit matured on June 18, 1919; that Ughet requested petitioner to make Russian funds, thought by Stanley to mean the Finance Ministry bank account, available in the emergency created by the interest due date on the Russian credit; and that Stanley said Ughet had no right to make the statement "because he had known for some time that this money was not available unless the Russian Government paid Guaranty Trust Company what it owed to them" (R. 78). Ughet testified that he remembered the conference but not the details; that he did not know Stanley (R. 40); and that he did not believe that anything was said by him or the representative of the petitioner with respect to payment out of the Finance Ministry account (R. 29).

sional Government recognized by the United States (R. 138).[8]

On another occasion the petitioner's counsel stated that "the officials of the Trust Company believe that the courts would sympathize with its position and probably delay any decision or any action until the establishment of a staple government in Russia" (R. 138). This attitude again shows that the petitioner, pending recognition of a Russian government did not intend to deny liability finally so as to remit the owner of the deposit to an action to recover the deposit at that time.

The respondent submits that an inference of an unequivocal refusal to pay the Ministry Account to one authorized to demand it should not be drawn from these facts. It seems clear that refusals to pay the account to unauthorized persons do not constitute an unequivocal denial of liability. For example, a bank's refusal to B's demand to pay A's account to B, in no way authorized by A to draw on the account, would not be construed as a definite refusal to pay A, and, indeed, a bank might defeat a suit by A based on such refusal on the ground that no proper demand had been made. *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295. So far as the

[8] At another time in June 1919 the petitioner's counsel considered the suggested solution, although the petitioner was not committed to accepting it, whereby a check for the balance of the account would be drawn to the order of the Russian Government and that government's endorsement by Ughet guaranteed by National City Bank (R. 134–135).

creation of the consolidated Russian account on February 25, 1918, is concerned, the letter of June 9, 1919, makes it evident that this arrangement was made tentatively, pending establishment of a recognized Russian government with which the petitioner could negotiate. Such conduct by a bank, we submit, does not disclose the intent and should not be construed as the adoption of the position that a setoff was irrevocably and definitely made, giving rise to a cause of action upon which the petitioner required that the owner of the deposit sue in order to obtain payment.

The record discloses nothing further with respect to the Finance Ministry account until, following a letter dated December 2, 1921, from the Secretary of State to the petitioner requesting information concerning the account, on December 7, 1921, Polk (formerly an officer of the State Department but at that time attorney for the petitioner) replied in a letter to De Witt C. Poole, Jr., at the Department of State in part as follows (R. 184):

> * * * The ambassador here never had any authority over it [the Ministry Account], nor did any of the officials in the United States so there is no one clothed with authority to dispose of this fund. The matter was carefully considered by Wardwell and myself as we were anxious if possible to secure some of this money for Russian relief, but we came to the conclusion

> regretfully that even if the Trust Company did not have a lien on the funds for their money taken over by the Russian Soviets, the Company would not be protected in paying out any of these funds on the order of any Russian official. However, all the information that you require will be given in the letter that the Secretary will receive tomorrow or the next day.

The refusal to release the fund, indicated by this letter, is based on (1) lack of an authorized person to whom to pay, which is not an unequivocal refusal, and (2) a "lien on the fund," which indicates not an unqualified repudiation of liability, but a reservation of the right to determine the facts and to negotiate a settlement of the alleged seizures of the petitioner's property in Russia when the recognition of the Russian Government permitted that course.

The letter dated December 9, 1921 (R. 109–110) from Sabin to the Secretary of State, the Honorable Charles E. Hughes, stated that the "Russian Ambassador in this country never had authority to draw on this account and never attempted to exercise any control," and that the account had been applied as a partial offset against the greater amount due from the Russian Government, and that when there was a Russian Government recognized by the United States the claim for the balance would be pressed.

Against this evidence, showing the absence of any intention on the part of the petitioner to make

and convey an unequivocal refusal to pay the fund to its true owner, the petitioner presented several affidavits purporting to contain recollections of several of its officers of alleged events and statements made by or to them during the period under discussion. The contents of most of these affidavits may be summarized as follows: that between November 1917 and March 1924, Sabin or some other person had told the affiants that the petitioner had refused to pay the fund to the representatives of the Russian Government in the United States.[9] Certain affiants claim that they had informed Ughet of the refusal to pay (Breton, R. 224–225) or that Ughet had told them that he was told by the petitioner that it would not pay (Murphy, R. 95). The petitioner also urges what it claims to be admissions by Russian officials in this country of knowledge of unequivocal repudiation.

The respondent submits that any force and effect which the petitioner's evidence may have been intended to have is of necessity dissipated when it is examined, as it should be, in the entire atmosphere of the surrounding circumstances which have been set forth above. Against these recollections the respondent urges the weight of documentary evidence, discussed above, which shows that the petitioner at all times intended to do no more than to postpone payment of this deposit until its real

[9] See, for example, affidavits by Stanley (R. 77); Reyburn (R. 87); Stetson (R. 96).

owner, or persons authorized by it, might assert the claim.

The correctness of the respondent's interpretation of the evidence is particularly confirmed by the fact that on October 14, 1933, and again, in 1934, the petitioner expressed its willingness to arrive at a settlement with the Soviet Government of "mutual claims in connection with ruble and dollar current account balances of the Guaranty Trust Company on the one hand and the Russian Government and/or the former native Russian banks or bankers on the other hand" (R. 207, 208, 211–212). The respondent submits that there is implicit in this offer of compromise an admission of the validity of the claim of the respondent's assignor, and that it shows the absence of any intent on the part of the petitioner at any time to make an unequivocal repudiation of its liability to the true owner of the Ministry Account.[10]

It is a fair inference, from all the evidence presented upon the proceedings below, that the attitude of the petitioner was primarily one of uncertainty; that it did not want to pay this fund to persons whose authority it doubted to the point of denying

[10] It is also to be observed that this recognition of the continued existence of an indebtedness to the Soviet Government constitutes an acknowledgment of the debt sufficient to revive a remedy barred by a statute of limitations. *Waltermire* v. *Westover*, 14 N. Y. 16, 20–21; *Dean* v. *Hewit*, 5 Wend. (N. Y.) 257, 262; *Henry* v. *Root*, 33 N. Y. 526, 530, 532–533, 535.

it; that it felt that the entire problem could be adequately treated only upon the establishment and recognition of a stable government in Russia, until which time it wanted to delay any action; and that because of this attitude it would not pay the representatives of a deposed Russian Government, lest it be compelled to pay the same amount again.

It is submitted, therefore, that there was no such refusal to pay as would be sufficient to start the period of limitation in this case.

B. At least, there is a conflict of evidence which required a trial of the issue of fact of unequivocal repudiation

The respondent earnestly contends that the District Court, on this record, should have found that there was no unequivocal refusal. But even if the view be taken that opposing inferences could have been properly drawn by the District Court from the evidence, the respondent submits that at least a conflict of evidence which entitled it to a determination of this issue, not in a summary proceeding on affidavits and depositions, but in a trial and upon full examination and cross-examination of all witnesses is present in this case.

The motion to dismiss the respondent's complaint was made under Rule 107, subdivision 6, of the Rules of Civil Practice (Appendix p. 99) which provides that the defendant in an action may move for judgment dismissing the complaint, on the complaint and affidavit tending to show that the cause of action did not accrue within the time limited by

law for the commencement of an action. However, Rule 108, (Appendix p. 99) provides, as construed by the courts, that if the plaintiff upon such a motion should deny by affidavit facts alleged by the defendant, the court must [11] order a trial of the issue of fact determinative of the motion before ruling upon the motion. *Giannavola* v. *General Railway Signal Co.*, 244 App. Div. 65. It must so clearly appear as to be without substantial doubt that the cause of action is barred before the court will grant such a motion without a trial of the issue of fact. *Press* v. *Draper*, 139 Misc. 263, 247 N. Y. S. 156, 157. Where a question of fact is put in issue, the plaintiff is entitled to have it tried. Only after it is determined the court may make a final disposition of the motion. *Herzog* v. *Brown*, 217 App. Div. 402, aff'd. 243 N. Y. 599; *Rizzuto* v. *U. S. Shipping Board Emergency Fleet Corp.*, 213 App. Div. 326.[12]

The respondent submits that here there was at least a denial of the fact of unequivocal repudiation and evidence which created an issue of fact on this question which requires a trial. The peti-

---

[11] The statute states that the court "may" direct a trial. This has been construed as "must" to avoid infringement of the constitutional right of litigants in common law actions to a trial. N. Y. Constitution, Art. 1, Sec. 2; *Herzog* v. *Brown*, 217 App. Div. 402, aff'd. 243 N. Y. 599, 154 N. E. 622.

[12] See also *Barker* v. *Conley*, 267 N. Y. 43; *Mohamed* v. *Unifruitco S. S. Co.*, 223 App. Div. 791; *Perloff* v. *Kelmenson*, 226 App. Div. 696; *Galanti* v. *Brady & Gioe, Inc.*, 211 App. Div. 858; *Campbell* v. *Muncie*, 246 App. Div. 632; *Horlick* v. *Horlick*, 243 App. Div. 559.

tioner has relied to a large degree upon affidavits of its officers and employees and transactions claimed to be recorded in its books. It is submitted that the court did not have before it a case of undisputed facts in favor of the petitioner. The respondent submits that the inference required by the facts was actually in its favor.

II

No Notice of Repudiation, Binding the Soviet Government, Was Given

Even assuming that *existence* of repudiation was proved beyond a dispute requiring a trial, which the respondent denies, no *notice* of such repudiation was given to any one in a manner which binds the Soviet Government, the owner of the deposit since November 7, 1917, a date prior to the alleged repudiation. The District Court stated that evidence supported its conclusion that Bakhmeteff and Ughet were given notice of repudiation (R. 267). Assuming, *arguendo,* that in fact they were given notice of any repudiation which may have been made, and some evidence does support this conclusion, the respondent contends that the District Court erred in the conclusion of law (R. 268) that such notice was effective to start the period of limitations because it failed wholly to apply the accepted principle of retroactivity of diplomatic recognition of a foreign government. *United States* v. *Belmont,* 301 U. S. 324. The District Court erroneously relied on decisions such as *Le-*

high Valley R. Co. v. *State of Russia,* 21 F. (2d) 396 (C. C. A. 2d), certiorari denied, 275 U. S. 571 (R. 268–269) which are inapplicable because decided on the basis of non-recognition of the Soviet Government.[13]

The respondent contends: (A) Notice of repudiation to be effective must be given to an authorized representative of the Soviet Government because recognition retroactively constitutes the Soviet Government the *de jure* Russian Government and exclusive owner of the deposit on and after November 7, 1917. (B) Even if not the *de jure* Government on November 7, 1917, the Soviet Government was the *de facto* Government from that time; therefore, the Provisional Government ceased to exist and, thereafter, none of its former representatives here could act for their non-existent principal with respect to the deposit.

A. Notice of repudiation must be given to an authorized representative of the Soviet Government

Recognition retroactively validates the acts of the government recognized from the time of its inception. *United States* v. *Belmont,* 301 U. S. 324;

[13] There is no basis for the sweeping general statement by the District Court to the effect that (R. 269): "It is settled by controlling decisions, and is not denied, that the recognized diplomatic representative of the Russian state had authority to sue the bank in our courts for the recovery of the deposit now under consideration." The petitioner consistently denied that Bakhmeteff or Ughet were authorized to demand or receive this deposit, although now it relies on notice to them to begin the period of limitations.

Ricaud v. *American Metal Co.*, 246 U. S. 304; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Underhill* v. *Hernandez*, 168 U. S. 250; *Luther* v. *Sagor* (1921), 3 K. B. 532.

Under this doctrine also, the Soviet decree of November 26, 1917, dismissing Bakhmeteff and all other diplomatic representatives averse to the Soviet Government and depriving them of any right to perform State duties or to make payments from State funds (R. 187, 217–218) is operative as of the date of its enactment.

Notice of repudiation after November 7, 1917, to be effective must be given to an authorized representative of the Soviet Government in Russia charged with the supervision of government deposits abroad and there is no record of such notice. If any notice in the United States would be effective, it would have to have been given at least to the designated representative of the Soviet Government in the United States, Mr. Ludwig Martens (R. 190, 218).[14]

B. Notice of repudiation to former representatives of the non-existent provisional government was ineffective to commence the period of limitations with respect to this deposit

Even if it could be assumed that recognition did not operate retroactively to make the Soviet Gov-

[14] Bakhmeteff certainly could not be considered as an authorized agent of the Soviet Government which he refused to recognize or consider as having any authority so far as he was concerned (R. 64).

ernment the *de jure* Government of Russia on November 7, 1917, it is clear that it became the *de facto* Government at that time. *Salimoff* v. *Standard Oil Co.*, 262 N. Y. 220; *Wulfsohn* v. *Russian Socialist Republic,* 234 N. Y. 373, dismissed for want of jurisdiction, 266 U. S. 580; Dickinson "Unrecognized Governments," 22 Michigan Law Review 118. The Provisional Government at that time ceased to exist as a principal which its former representatives could represent for purposes of receiving notice of repudiation of liability on the deposit.

It is true that, although their government, the source of their authority, had ceased to exist, our Government did not deny the diplomatic status of Bakhmeteff and Ughet as Ambassador and Financial Attaché, respectively, and on some occasions gave the usual formal official certificates concerning their status (R. 186, 246–247). They were not, however, representatives of the Soviet Government, the Russian Government after November 7, 1917. Moreover, the respondent submits that the reason for their retention, as appears from the record discussed below, supports the view that their presence here cannot be made the basis for the petitioner's contention that notice to them was effective to commence the period of limitations against the owner of the bank deposit.

Bakhmeteff and Ughet were permitted to continue to act in this country for the purpose of assisting in liquidating outstanding substantial contracts between the Russian Government and Amer-

ican manufacturers for war supplies (R. 65–66, 219–220).[15]

The United States Government, in the situation of the overthrow of the Provisional Government by the unrecognized Soviet Government, considered it important that there should be in this country a representative of the Russian interests who might be in a position to liquidate these contracts and dispose of materials in such a way that the interests of American manufacturers might be protected (R. 219–220).

Our Government was also interested in the protection of American holders, including our Government, of Russian Government obligations (R. 220).

An arrangement with these ends in view was made by our Government with Bakhmeteff and carried out by him and Ughet (R. 65–66, 107–108, 219–220).[16]

---

[15] On July 5, 1917, Bakhmeteff was received by the President of the United States as Ambassador of Russia (R. 217). Ughet originally acted, under designation of January 23, 1917, as the representative of the Ministry of Finance with the Russian Supply Committee in the United States (R. 116). Bakhmeteff stated in a deposition that extensive war contracts had been made, and that the entire Russian organization in the United States, engaged in liquidating them, acted under his supervision (R. 65–66).

[16] It is to be observed that the procedure followed in France was to appoint administrators of the property in France of the former Imperial Russian Government. See *Jaudon* v. *Societe de l'Industrie Chimique*, Annual Digest of Public International Law Cases (1929–1930) No. 73.

By using the balances in the accounts in the National City Bank, upon which Bakhmeteff was expressly authorized to draw (R. 213) all of these contracts were settled. Some of them were performed in whole or in part, and others were cancelled. Material delivered under the contracts was purchased from Bakhmeteff by the United States and the Allied Governments for war purposes (R. 214–215). Cash received was placed in the accounts in the National City Bank subject to withdrawal if the Treasury of the United States made no objection. When Bakhmeteff had completed his task, he turned over the balances in the accounts to the Treasury Department to apply against interest on the indebtedness of the Russian Government to the United States (R. 214–215), and then, at the invitation of the State Department (R. 46), in a letter dated April 28, 1922, to Secretary of State Hughes, he wrote (Appendix, pp. 104):

> * * * I have remained at my post up to the present time in order to serve and protect Russian national interests and to facilitate, in cooperation with the Treasury and State Departments, the liquidation and final settlement of a large volume of commercial business for which the Government of Russia stood obligated, partly through my agency, to American business concerns. I am happy to believe that American as well as Russian interests have been served thereby.
>
> The work of liquidation has now been brought to a practical close. * * *

Bakhmeteff retired on June 30, 1922, and thereafter he had nothing whatever further to do with the conduct of Russian affairs in this country (R. 59). Pursuant to and authorized by an exchange of notes, between Bakhmeteff and Secretary Hughes, dated April 28 and 29, 1922 (Appendix pp. 103–106), Ughet continued to be considered as the custodian of Russian property in the United States for which Bakhmeteff had been responsible.[17]

On October 21, 1933, Ughet wrote to the Department of State (R. 193–194) that conditions might arise in the near future (recognition of the Soviet Government) where no further useful purpose could be served by his continued exercise of the duties with which he was vested under the exchange of

---

[17] Following this exchange of notes, under which Ughet purported to act thereafter (R. 193–194), Bakhmeteff, in a letter dated June 7, 1922, to the Secretary of State, enclosed a copy of a document executed by Bakhmeteff on that date, which recited that he appointed Ughet custodian of Russian property in the United States, granting him, among others, power to commence suits when necessary in Ughet's opinion (R. 191–192). The respondent submits that any powers which Bakhmeteff may have had as Ambassador to sue after November 7, 1917, were restricted to matters of liquidation of the contracts which was the limited purpose for which our Government continued to retain him. That power, if it existed, did not extend to a demand or suit for the deposit here involved, over which Bakhmeteff had no control, as the petitioner has always maintained. Moreover, any power to bring suit, which Bakhmeteff, as Ambassador, may have retained, could not be delegated either to a custodian of Russian property or to a firm of attorneys "if at any time Russia should be without any representative," as he also attempted to do (R. 192–193).

notes between the Russian Ambassador and Secretary of State of April 28th and 29th, 1922, referred to above. Consequently, he requested that his status be discontinued. A reply from the Acting Secretary of State to Ughet dated November 16, 1933 (R. 194–195) stated that in view of the recognition of the Soviet Government, the Government of the United States ceased to recognize him as Russian Financial Attaché on November 16, 1933.

On November 16, 1933, coincident with the establishment of diplomatic relations between the United States Government and the Soviet Government, the international compact between the two governments, contained in the exchange of notes between the President of the United States and the People's Commissar for Foreign Affairs for the Soviet Government, was made (Appendix pp. 100–103). In the note dated November 16, 1933, to the President and signed by the People's Commissar, the Soviet Government, preparatory to a final settlement of the claims and counterclaims between the governments and the claims of their nationals, assigned to the United States all amounts admitted to be due or that may be found to be due the Soviet Government as successor of prior governments of Russia, or otherwise, from American nationals, the Soviet Government to be duly notified in each case of any amount realized by the United States Government from the assignment. This note further stated that the Soviet Government, preparatory to the settlement, agreed not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

In the absence of this international compact, the Soviet Government, after recognition, would have been entitled to sue in our courts with respect to its claims to property in the United States of former Russian Governments and Russian nationals. The fact that some of this property was used prior to recognition to settle, in whole or in part, a number of American claims, with the cooperation of the United States Government, discussed above, indicates that the purpose of these provisions of the agreement is that the Soviet Government shall not make any claims with respect to judgments or acts done and settlements made with respect to Russian property, with the approval and under the control of our Government, and to leave any further action with respect to such matters for determination by our Government. That this was the purpose of the language of the assignment quoted above is further made clear by the letter from the State Department to the At-

torney General * (Appendix, pp. 106–107), which states in part:

> By Subdivision (b) of the second paragraph of this letter the Government of the Union of Soviet Socialist Republics is understood to have agreed not to make any claim in connection with adjustments, compromises, or agreements entered into or approved by any official of the Government of the United States or any State or Subdivision thereof, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

Respondent submits that these facts establish that the motive and purpose for which Bakhmeteff and Ughet were retained by our Government was the protection of the interests of American nationals in this country. Our government understood that following the fall of the Provisional Government on November 7, 1917, the successor, Soviet Government, did not recognize Bakhmeteff and Ughet as its representatives (R. 217). The authority of these representatives, derived from a Government which had ceased to exist, thereupon, in fact, ceased altogether at its source even though a continuing restricted authority, based entirely on our Government's sufferance and consent, was not denied by our Government solely for the limited and proper purpose of protecting the interests of

*This letter, not in the record, was submitted to the Circuit Court of Appeals in connection with the argument of this case.

American bondholders and American nationals in liquidating the war contracts. Such authority must be measured strictly by the urgent necessity, which was its only basis. See *Matter of People, Norske-Lloyd Ins. Co.*, 242 N. Y. 148; *Matter of People, City Equitable Insurance Co.*, 238 N. Y. 158; also *United States* v. *President and Directors of the Manhattan Company*, 276 N. Y. 396; *Matter of People, Northern Insurance Co.*, 262 N. Y. 453. It should not be made the basis for adjudication after recognition of the Soviet Government.

Even apart from the fact that they were not representatives of the Soviet Government, sole owner of the deposit, the limited authority of Bakhmeteff and Ughet affords no basis for any contention that as a matter of fact they were authorized to receive notice of repudiation or to bring suit for the Ministry of Finance account which was never subject to their control, as the petitioner always insisted, or related to or available for the special purposes, concerning which their limited authority was not denied.

The petitioner has always asserted that Bakhmeteff and Ughet had no power to withdraw this account, but in this action, it inconsistently, we think, now claims that they were authorized to sue for the deposit (Brief, p. 68) citing *State of Russia* v. *Bankers' Trust Co.*, 4 F. Supp. 417 (S. D. N. Y.) the United States substituted as plaintiff-appellant 69 F. (2d) 44, and affirmed *sub nom. United States*

v. *National City Bank of New York*, 83 F. (2d) 236 (C. C. A. 2d), certiorari denied 299 U. S. 563; *Russian Government* v. *Lehigh R. Co.*, 293 Fed. 133 and 293 Fed. 135 (S. D. N. Y.), affirmed *sub nom. Lehigh R. Co.* v. *State of Russia*, 21 F. (2d) 396, 21 F. (2d) 406 (C. C. A. 2d) certiorari denied 275 U. S. 271. See also Agency of *Canadian Car & F. Co.* v. *American Can Co.*, 253 Fed. 152 (S. D. N. Y.), affirmed 258 Fed. 363 (C. C. A. 2d).

Even apart from respondent's contention that these cases, based upon nonrecognition of the Soviet Government, can not be applied now after recognition, they are distinguished because they involved matters within the limited authority of Bakhmeteff and Ughet not denied by our Government. The *Bankers' Trust* case in the District Court merely followed the *Lehigh Valley* decision and did not consider the limited authority of Bakhmeteff or Ughet.

The *American Can* case involved two contracts for munitions made in 1915 by the Imperial Russian Government and, as Bakhmeteff testified, the Russian Supply Committee was authorized to deal with such contracts. The court held that the validity of an assignment of the Russian Government's interests in these contracts by the Supply Committee could not be questioned in order to avoid payment admitted by the defendant to be due on the contracts. In the *Lehigh Valley* case, suit to recover damages for destruction in 1916 of Russian

Government matériel in the custody of the defendant railroad had been begun by the Ambassador in 1918, before his retirement in 1922. The Circuit Court of Appeals held that the defendant could not avoid liability, which had been established on the trial, on the ground that action had abated, because Ughet had the authority and duty to continue the action. Both the *American Can* and the *Lehigh Valley* cases involved these matters which the United States wished settled.[18]

In the *Bankers Trust* case, the account was deposited with the Bankers Trust Company in 1917, in the joint name of three members of the Russian Mission of Ways of Communication. The bank agreed to the segregation of the balance in a special account in the National City Bank of New York in the name of Ughet. When Ughet demanded the money the bank refused to release it.

---

[18] In the *Lehigh Valley case*, $764,554.89 out of recovery of $980,431.24 was paid by Ughet to the United States Treasurer "on account of interest due on obligations of the provisional Government of Russia held by the Treasury." Combined Annual Reports of the (U. S.) World War Foreign Debt Commission, 1922–1926, p. 87; Hudson *Cases on International Law*, p. 121 (2nd ed.).

The court adverted to the fact that delay might have given rise to the bar of limitations (21 F. (2d) 400), which in that case was a two-year period included in the bill-of-lading (293 Fed. 133). The distinction between the application of such an express contractual limitation, agreed to by the shipper, whether a sovereign or private individual, and an attempt to raise the bar of the general statute of limitation to which the sovereign has never agreed, is apparent. *United States* v. *Chesapeake & D. Canal Co.*, 206 Fed. 964, 969 (D. Del.), affirmed 250 U. S. 123.

The District Court, in an opinion dated September 18, 1933, stated that the principle of the *Lehigh Valley* case was controlling on the question of Ughet's authority to sue. After diplomatic recognition of the Soviet Government, the United States was substituted as plaintiff appellant, and the question was not involved on the appeal which was decided on the basis of the defendant's setoff.

The respondent submits that Bakhmeteff and Ughet were permitted to exercise authority because of the matters in which our Government was interested and wished settled. It is clear that our Government disapproved of the consolidation transaction (R. 201) and refused to acquiesce in it in any manner (R. 129–130). Ughet stated that he conferred with officials of the State Department in order to ascertain the wishes of the United States Government in respect to instituting an action against the petitioner for this deposit, but no definite decision was reached by the State Department as to whether a suit should then be brought (R. 177). This bank deposit was not within the scope of the matters concerning which our Government permitted Bakhmeteff and Ughet to continue to act. The provisions of the compact between the United States Government and the Soviet Government, whereby the Soviet Government agrees not to assert claims with respect to judgments or acts

done and settlements made, do not refer to matters such as this bank deposit, which is not within their intent as shown by the letter of June 1937 quoted above.

The petitioner has at all times refused to recognize either Bakhmeteff or Ughet as persons in any way authorized to deal with this deposit. In fact, the petitioner strongly maintained that the only persons authorized to deal with this account were designated officials of the Ministry of Finance. It would seem reasonable, therefore, that if the petitioner wanted to give proper notice it should have given it to persons charged with the control and supervision of this account. It may not be seriously urged that where a government is involved, engaged in multifarious State activities, notice to any employee, chosen at random or convenience, would be binding upon the government in connection with some matter, where it has designated persons specifically charged with the particular matter.

But even if it be further assumed that notice to an Ambassador is effective to begin the period of limitations, such a rule would be based on the presumption that it would be conveyed to the officials of his government charged with conduct of the matter involved. Bakhmeteff had no Government

to which he could convey notice. He could not sue without authorization from his Government. In his path stood the obstacle of the doctrine, supported by considerable authority, that an Ambassador may not sue without the express consent of his government. In *Baron Penedo* v. *Johnson*, 29 L. T. 452, the Court said:

> A minister does not represent a foreign government for the purposes of suing in this court.

In *Colombian Government* v. *Rothschild*, 1 Sim. Ch. Rep. 94, 57 Eng. Rep. 514, the Attorney General of the British Empire successfully argued that "it has been decided that an Ambassador does not represent his government in a Court of Justice." As a general rule, an ambassador may not submit himself or his nation to the jurisdiction of a foreign court without the express authorization of his government. *Dickinson* v. *Del Solar* (1930), 1 K. B. 376, 380.[19]

---

[19] See also *Suarez* v. *Suarez* (1918), 1 Ch. 176; *Ex Parte Muir*, 254 U. S. 532; *Reichenbach et Cie.* v. *Mme. Ricoy* (France, Civil Trib. Seine, 4 April 1906), 34 Clunet, Jour. de droit int. privé (1907) 111; *Cottonet et Cie.* v. *Raffalowitch* (France, Civil Trib. Seine, 18 November 907), 35 Clunet, Jour. de droit int. privé (1908) 153; *Nazare Agha* v. *Galezowski* (France, Cour d'appel, Paris, 1912), 39 Clunet, Jour. de droit int. privé (1907) 1133; Pradier-Fodéré, *Cours de droit diplomatique* (2d ed. 1899), vol. 2, p. 152;

III

Even if notice of repudiation had been given to the Soviet Government the statute of limitations did not begin to operate because that government was prevented from suing in our courts

The Soviet Government has on at least four occasions tried to protect its rights and interests in Courts of the United States, either directly or by agents, and in each instance was met with the refusal of the court to entertain the action on the ground that an unrecognized government could not resort to our courts. *R. S. F. S. R.* v. *Cibrario,* 235 N. Y. 255; *Preobazhenski* v. *Cibrario,* 192 N. Y. Supp. 275; *The Penza,* 277 Fed. 91 (E. D. N. Y.); *The Rogdai,* 278 Fed. 294 (N. D. Cal.).

It is an established rule of law that the statute will not operate against a plaintiff who has no forum in which to assert its rights. *Oswego & Syracuse R. R. Co.* v. *State,* 226 N. Y. 351, 360, 362; *Cayuga County* v. *State,* 153 N. Y. 279, 291; *Parmenter* v. *State,* 135 N. Y. 154, 163. In addition to statutory exceptions to the operation of the statute

---

Instructions to Diplomatic Officers of the United States (1897), Sec. 46, p. 18; *Instructions to Diplomatic Officers of the United States* (1927), Ch. VII, Sec. 1; Ogdon, *Juridical Bases of Diplomatic Immunity* (1936), 133 ff.; Fauchille, *Traité de droit international public* (8th ed. 1926), Tome 1, 3ème partie, p. 69; Morton, *Les priviléges et immunités diplomatiques* (1927), 147; there is a collection of material in the Harvard Law School Research in International Law, *Diplomatic Privileges and Immunities* (1932), Special Supplement 26 American Journal of Int. Law (1932), 124 ff.

of limitations (e. g. New York Civil Practice Act § 24) there exist other exceptions, based largely upon the doctrine of "invincible necessity" as the factor compelling an exemption from the operation of the statute. *McIver* v. *Ragan*, 2 Wheat. 25, 29; *Braun* v. *Sauerwein*, 10 Wall. 218, 223; *United States* v. *Wiley*, 11 Wall. 508, 513; *Hanger* v. *Abbott*, 6 Wall. 532, 540–542; *Amy* v. *Watertown*, No. 2, 130 U. S. 320, 325; *Brenner* v. *Quick*, 88 Ind. 546, 555. Among these exceptions are those applied where there is no person in existence qualified to institute process. *Hobart* v. *Connecticut Turnpike Co.*, 15 Conn. 145, 149; *Baker* v. *Barclift*, 76 Ala. 414, 417; *Sorrels, Adm'r* v. *Trantham, Adm'r*, 48 Ark. 386, 390. A cause of action accrues when there is a demand capable of present enforcement. *Jacobus* v. *Colgate*, 217 N. Y. 235. When such present enforcement is prevented by a superior power without default on the part of the creditor, none of the reasons which induced the enactment of the statute of limitations applies. Wood, *Limitations*, p. 17 (4th Ed.).

Any statute of limitation which, in its operation, fails to afford an aggrieved person a full opportunity to enforce his right before his remedy becomes barred imposes an unreasonable limitation forbidden by the Constitution of the United States (*Wilson* v. *Iseminger*, 185 U. S. 55, 62–63; *Keskonong* v. *Burton*, 104 U. S. 668, 675; *Terry* v. *Anderson*, 95 U. S. 628; *Christmas* v. *Russell*, 5 Wall. 290, 300; *Jackson* v. *Lamphire*, 3 Pet. 280, 289;

Lamb v. *Powder River Live Stock Co.*, 132 Fed. 434 (C. C. A. 8th); *Jacobus* v. *Colgate, supra*), and such a construction is to be avoided.

In view of these rules the respondent submits that the statute of limitations could not and did not operate against the Soviet Government during the entire period of its disability to enforce its rights in our courts.

Part Two

Foreign sovereigns are not bound by state statutes of limitations

Assuming, for the argument of Part Two of this brief that, under the facts of this case, the New York statute of limitations would have run if a private person owned the bank deposit, and that the United States is in no better position than the Soviet Government, the respondent contends that the statute cannot be applied against a foreign sovereign.

The court below correctly, we submit, held (R. 284):

> * * * To declare that the principle [of sovereign immunity from state limitations] is applicable to the United States but not to a foreign sovereign is to accord to the latter less than full sovereign rights. Whether a foreign government shall be accorded less than full sovereign rights in the United States is a matter pertaining to international relations over which the national government has complete control. * * *

The respondent contends (I) that as a matter of federal procedure, a state statute of limitations is not applicable to a law action in the federal courts by a foreign sovereign; (II) that the state statute is not intended to apply to foreign sovereigns which it does not expressly include; and, (III) that the court below correctly held that a state cannot bind foreign sovereigns by its statutes of limitations.

I

Under the Federal Rules of Decision Act the New York statute of limitations is not applicable to a law action by a foreign sovereign in a federal court

Even assuming that the New York statute of limitations could validly apply in suits by foreign sovereigns in state courts, and even assuming that the United States is in no better position than the foreign sovereign in this action, it cannot apply because this is not a case where state laws apply within the meaning of the Rules of Decision Act (R. S. Sec. 721, U. S. Code, Title 28, Section 725). *United States* v. *Thompson,* 98 U. S. 486; *U. S.* v. *Hoar,* 2 Mason 311, 26 Fed. Cas., No. 15,373 (C. C. Mass.)[20]

In *United States* v. *Thompson, supra,* this Court held that the Minnesota six year state statute of

[20] This point and the similar point, *infra*, p. 83, was not raised in or considered by the courts below but is advanced as an additional reason for the correctness of the result reached by the Circuit Court of Appeals in not applying the state statute of limitations. See *Helvering* v. *Gowran,* 302 U. S. 238, 245.

limitations, which expressly applied to the State, as in the instant case, would not be presumed to and could not apply to the United States. The argument was made that the Rules of Decision Act gives the same efficacy to state statutes of limitations in the federal courts that they have *proprio vigore* in the State courts, and that, therefore, Congress intended that a State statute of limitations which applied to the sovereign, the State, in the state courts, should apply to the sovereign, the United States, in the Federal courts. This Court, rejecting the argument, stated at page 490:

> The United States not being named in the statute of Minnesota, are not within its provisions. It does not and cannot "apply" to them. If it did, it would be beyond the power of the State to pass it, a gross usurpation, and void. It is not to be presumed that such was the intention of the State legislature in passing the act, as it certainly was not of Congress in enacting the law of 1789. *United States* v. *Hoar, supra; Field* v. *United States,* 9 Pet. 182.
>
> * * * * *
>
> The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the States can pass statutes of limitation binding upon the Federal government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark.

> But viewing the subject in the light of considerations *ab inconvenienti,* we need not look beyond the consequences of the ruling, if sustained, of the court below. The doctrine is alike applicable to civil and criminal actions. There are thirty-eight States in the Union. The limitations in like cases may be different in each State, and they may be changed at pleasure, from time to time. The government of the Union would in this respect be at the mercy of the States. How that mercy would in many cases be exercised is not difficult to foresee. The constitutional relations of the head and the members would be reversed, and confusion and other serious evils would not fail to ensue.

The view of this Court that if States can subject the United States to state statute of limitations, they can make the United States suable in their court, applies equally to foreign sovereigns, because States cannot make foreign sovereigns suable in their courts. Also the considerations *ab inconvenienti* apply equally to foreign sovereigns. The respondent submits, therefore, that the Rules of Decision Act does not authorize application of a state statute of limitations in a law action in the federal courts by a foreign sovereign.

In *United States* v. *Hoar, supra,* the Court, in an opinion by Mr. Justice Story, held that Congress did not intend in the Rules of Decision Act that the Massachusetts statute of limitation should bind the United States in law actions in the federal courts

and stated that to permit the statute of limitations to apply to the United States would be to subject "public rights, revenue, and property * * * to the arbitrary limitations of the states; and the limitations are so various in these states that the government would hold their rights by a very different tenure in each."

In view of the fact that foreign relations always have been a matter of exclusive national concern (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304) and that States are prohibited from acting in this field even in the absence of positive federal action (*United States* v. *Rauscher*, 119 U. S. 407, 412–414; *Henderson, et al.*, v. *Mayor of New York, et al.*, 92 U. S. 259, 271–272), it is submitted that Congress did not intend in the Rules of Decision Act that foreign sovereign suing in federal courts should be subject to the various limitations of the States.

II

A state general statute of limitations does not bind a foreign sovereign; particularly, the New York statute does not bind the Soviet Government

The petitioner devotes the greater part of its brief (Part I, pp. 13–71) to the proposition that the New York state statute of limitations binds foreign sovereigns, and that at the time the claim here was assigned to the United States it was barred by this general period of limitations.

Assuming for this part of the argument that the New York statute would bar a private person who made the deposit, under the facts of the case, and that the United States is in no better position than the Soviet Government, the respondent contends (A) that the New York statute which does not name foreign sovereigns does not intend to bind them; and (B) that a State of the United States lacks power to bind foreign sovereigns by limitations.

A. The New York statute of limitations is not intended to apply to foreign sovereigns

The respondent contends that the complete lack of any intention to bind foreign sovereigns by the general language of the New York statute of limitations is shown by (1) the language of the statute which does not expressly include foreign sovereigns; (2) the reason for the sovereign exemption, applicable alike to the local and domestic sovereigns; (3) the rule of international law that sovereign claims are not subject to local statutes of limitations; (4) the rule of the law of nations that sovereigns are immune from suit; and (5) the lack of power to enact such legislation.

1. The terms of the statute do not include foreign sovereigns

The New York statute of limitations is contained in the Civil Practice Act, Art. II, "Limitations of Time," Sections 10–61. Section 15 provides that the time within which an action must be commenced

for a deposit of money, not to be repaid at a fixed time but only upon a special demand, must be computed from the demand. Section 48 provides that an action upon a contract obligation must be commenced within six years after the cause of action has accrued. Section 54 provides that the limitations prescribed in Article II for actions other than for the recovery of real property apply alike to actions by private persons and to actions in the name of the people of the state or in their behalf.

Section 977–b, Subsection 18, provides in part that the time between the nationalization of a foreign corporation and the appointment of a receiver of its property in New York, plus three years, shall not be part of the time limited for commencing an action by or against such a corporation, whether or not the action has already been barred. This section applies to nationalized former Russian corporations. *United States* v. *Belmont,* 85 F. (2d) 542 (C. C. A. 2d), reversed 301 U. S. 324. Non-recognition of the Soviet Government from 1917 to 1933 was a cause of the enactment of this statute, and, apparently, the New York legislature was motivated by the consideration that the normal statute of limitations was inappropriate for this abnormal situation. The respondent submits that the statute of limitations should not be construed to give the Soviet Government a lesser remedy as successor to prior Governments than as successor to its nationalized corporations.

It has always been the law in England and the United States, as a canon of statutory construction, that a statute of limitations does not bind the local sovereign unless the statute expressly so provides. *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Administrator of Hungarian Property* v. *Finegold*, 144 L. T. 670 (C. A. 1931); Bracton, De Legibus Liber, II c. 5, Sec. 7. This has always been the rule expressed in state courts including New York. *People* v. *Gilbert*, 18 Johnson 227 (N. Y. 1820); *Stoughton* v. *Baker*, 4 Mass. 521 (1808).

Under our constitutional system of dual sovereignty the same rule of construction is applied, and a state statute will not be construed to bind the United States. *United States* v. *Thompson*, 98 U. S. 486.

In *United States* v. *Hoar*, 2 Mason 311, 314, 26 Fed. Cas., 329, No. 15, 373 (C. C., Mass.), a leading case reviewing the early English authorities, Mr. Justice Story stated the rule of this sovereign exemption, expressed in the maxim *nullum tempus occurrit regi*, as follows:

> But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the lan-

> guage used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.

Recently this Court stated, citing the *Hoar* case, that the rule exempting the sovereign from general limitations is "a classical instance" of the canon of statutory construction that the general words of the statute do not include the Government or affect its rights unless the construction be clear and indisputable upon the text of the statute. *Nardone et al.* v. *United States,* No. 190, Present Term, decided December 20, 1937, Pamp., pp. 3–4. The basis of this rule of construction is the view that sovereign interests should not be defeated or limited by the general words of the statute which do not disclose such an intention. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239.

In view of this unquestioned rule of construction, it was necessary to mention the people of the State of New York in the statute by express terms in order to include the State. Other sovereigns not named, the United States or foreign sovereigns, are not included. This conclusion is supported also by the familiar rule of construction that inclusion of one of a class in a statute excludes other members of the same class not named.

No intent to include foreign sovereigns can be inferred from any of the words of the statute. And certainly it may be assumed that no positive intent to include foreign sovereigns accompanied enactment of this statute.

The question of inclusion of foreign sovereigns in the New York statute has not been discussed by the state courts of New York. In the absence of state court decisions a construction of the statute should not be adopted which is not required by its terms and which defeats sovereign rights. This is especially true in the present case when such a construction would at least raise a doubt of the validity of the State statute so construed (pp. 77–82, *infra*).

2. The reason for the rule applies equally to domestic and foreign sovereigns

a. *Reason for the Rule.*—The basis of this rule of construction exempting sovereigns from general statutes is the view that the legislature does not intend to defeat or diminish the sovereign's inter-

ests by the general words of the statute disclosing no such intention. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239; *United States* v. *Hoar, supra.* Examination of the development of the rule of exemption of the sovereign from limitations, apart from the general rule of the exemption of the sovereign from all general statutory provisions, discloses that the rule, at first expressed as a protection of royal prerogative and public rights (Bracton, *supra*) was later stated to be in itself a royal prerogative. *Magdalen College Case,* 11 Co. Rep. 66b, 74b (1616); *Sir William Candish's Case,* 1 Plowden 321 (1567). For a time the basis of the rule was said to be the presumption that the King, being daily employed in public affairs, lacked full opportunity to enforce his rights and should not be barred by delay. Bacon's Abridgment, Prerogative, E 6 (1736); Blackstone's Commentaries, Vol. I, p. 247 (Cooley 4th Ed.).

In *United States* v. *Hoar, supra,* Mr. Justice Story reviewed some of the earlier authorities and stated the rule as follows (2 Mason, 311, 314; 26 Fed. Cas. p. 330):

> * * * The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, though sometimes asserted to be, because the king is always busied for the public good,

and, therefore, has not leisure to assert his right within the times limited to subjects (1 Bl. Comm. 247), is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments. We find accordingly, in our own state, the doctrine is well settled, that no laches can be imputed to the government, and against it no time runs, so as to bar its rights (*Inhabitants of Stoughton* v. *Baker,* 4 Mass. 528); so, that it is clear, that the statutes of limitations pleaded in this case would be no bar to a suit brought to enforce any right of the state in its own courts.

But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very differ-

ent, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.

This Court has repeatedly stated that the modern basis of the rule of exemption from limitations which gives it vitality at present, is the public policy that public rights and interests shall not be lost or diminished by the failure of public officials to assert them properly. *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427; *United States* v. *Nashville etc. R. Co.*, 118 U. S. 120, 125; *Fink* v. *O'Neill*, 106 U. S. 172, 281; *United States* v. *Thompson*, 98 U. S. 486, 489; *United States* v. *Knight*, 14 Pet. 301, 315; *United States* v. *Kirkpatrick* 9 Wheat. 720, 735.

b. *The reason for sovereign exemption applies equally to local and foreign sovereigns.*—The public policy which is the basis of the rule of exemption is "applicable to all governments alike." *United States* v. *Nashville Etc. R. Co.*, 118 U. S. 120, 125; *Gibson* v. *Chouteau*, 13 Wall. 92. It is plain that all governments are so conducted that such a policy is most useful and necessary in the protection of public rights. It is evident also that this public policy is applicable to public rights to be enforced in foreign as well as domestic courts.

The court below stated in its opinion that "In *United States* v. *Nashville R. Co.* 118 U. S. 120, 125, there is a dictum that the principle of public policy which forbids that the public interest should be prejudiced by the negligence of the officers or agents to whose care they are confided is 'applicable to all governments alike.' "

The petitioner contends (Brief, pp. 28–32) that the court below was influenced by the misinterpretation of this dictum. The respondent submits that the lower court's opinion by Judge Swan indicates that the dictum was used in the sense that it is used here, namely that governments are so conducted that the reason for the sovereign exemption is applicable to them all alike.

It is apparent, at least, then that a sovereign which has a policy that limitations shall not bind it in suits in its own courts equally desires that it shall not be barred in suits in foreign courts. Practically, the only manner in which the latter policy can be achieved is by the uniform rule that sovereigns whether domestic or foreign are not bound by general statutes of limitations.

The rule recognizes that public rights often may not be enforced promptly and are much too important to be barred by general limitations which are framed with respect to private rights. Certainly these considerations apply to the governmental activities of foreign sovereigns as well as local sovereigns and the same rule should apply.

Furthermore, to hold that a foreign sovereign is subject to operation of state statutes of limitations would be to hold it bound by scores of varying statutes of limitations of the States of the United States which for a contract of this nature range from three to fifteen years.[21] The confusion which would result from such a rule in the field of our foreign relations is manifest. National interests would require that in this respect there should be uniformity.[22] The mischief of a contrary rule would be very great (*United States* v. *Hoar*, 2 Mason 311, 315), and it is for that reason, among others, that our courts have held that as to foreign sovereigns the States as such do not exist.[23]

The respondent submits that this rule of convenience requires the exemption of a foreign sovereign from the operation of State local statutes of limitations.

3. The rule of international law that sovereigns are not bound by general statutory limitations of municipal law in international tribunals supports the conclusion that the New York statute was not intended to include foreign sovereigns

In international law and practice concerning the adjudication of claims between sovereigns on be-

---

[21] Mix, State Statutes of Limitations, 3 Rocky Mountain L. R. 106, 118–129. A schedule of these various statutes of limitations appears in the Appendix at page 98 below.

[22] *Buckner* v. *Finley*, 2 Pet. 586, 590; *The Lottawanna*, 21 Wall. 558, 575; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, 273; *United States* v. *Thompson*, 98 U. S., 486, 491; *Workman* v. *New York City, Mayor*, 179 U. S. 552, 558.

[23] *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *People ex rel. Barlow* v. *Curtis*, 50 N. Y. 321, 326.

half of themselves and their nationals, the municipal statutes of limitations of the sovereigns involved do not apply. *The Pious Fund of the Californians,* Foreign Relations of the United States (1902), Appendix II, p. 63; *Collac* v. *The Yugoslav State,* Annual Digest of Public International Law Cases, pp. 196, 197 (1929–1930); *Sarropoulos* v. *Etat Bulgare,* Annual Digest, p. 263 (1927–1928); *George W. Cook No. 2,* Annual Digest, p. 264 (1927–1928); *The Spader Case,* Venezuela Arbitration Commission, p. 161 (1903); *The Gentinni Case,* Venezuela Arbitration Commission, p. 720 (1903); Case of King and Gracie, U. S.—Gt. Britain Comm. (1853–1855) p. 305; *The Mossman Case,* 4 Moore, Int. Arb., p. 4180; *The Williams Case,* 4 Moore, Int. Arb., p. 4181.[24]

In the *Pious Fund* case, decided by the Permanent Court of Arbitration and in the *George W. Cook* case decided by the United States-Mexico General Claims Commission it was asserted by Mexico that the claims were barred by the Mexican statute of limitations. In each case the respective tribunal rejected the applicability of municipal statutes of limitations to international claims.

---

[24] See also Borchard, *Diplomatic Protection of Citizens Abroad,* p. 829; Ralston, *Supplement to the Law and Procedure of International Tribunals,* p. 185 (1936); Lauterpacht, *Private Law Sources and Analysis of International Law,* pp. 118–119 (1927); Pomeroy, *Lectures on International Law,* Sec. 111, pp. 125–127; Kluber, *Droit de Gens,* Sec. 125; Martens, *Droit de Gens,* Secs. 70, 71.

The attitude of the United States in this respect is particularly well stated in a communication written in 1849 by the Secretary of State of the United States in a dispute concerning claims by American citizens against the government of Ecuador. To the objection that these claims were barred by the Ecuador statute of limitations he wrote:

> This Government can never allow any claims of our citizens which it may think proper to present to another government, to be rejected on account of a municipal law of the foreign government like that in question * * * It is essential to the dignity of the state that it should consult its own convenience in preferring complaints of this character * * * An acquiescence by us in the position assumed, would subject us to the imputation of sacrificing the rights of our injured citizens to a mistaken forbearance towards their aggressors. If, therefore, the law referred to should again be mentioned as an impediment to the adjustment of the claims, you will, in a firm, decided yet respectful manner, declare that it can never be acknowledged as such by this government. Moore's Digest of International Law, Vol. 6, p. 1002.

The inapplicability of any statute of limitations to sovereigns, however, does not create the danger of the enforcement of stale claims because international law applies a clear rule of laches to sovereign claims. *Maryland* v. *West Virginia*, 217

U. S. 22; *Barbarie* v. *Venezuela,* 4 Moore, Int. Arb., p. 4199; Borchard, *Diplomatic Protection of Citizens Abroad,* p. 830; Moore's Digest of International Law, Vol. 1, Sec. 88.[25]

The complexity and delicacy of international relations, which may often cause an excusable delay in the presentation of government claims, makes it evident that the flexible rule of laches, which considers the special facts of each case, supplies the proper equitable limitation of time for the presentation of government claims. Local general statutes providing short periods meant to govern private commercial transactions are wholly inapplicable.

The instant case serves as a good example of a situation in which the doctrine of laches and not a local six-year statute of limitations provides the only fair and equitable limitation on the sovereign's claim. During the period of non-recognition of the Soviet Government it was not permitted to sue in our courts. All parties interested in the bank deposit were in doubt concerning the manner in which it should be treated in the absence of recognition. Certainly the local statute of limitations was not intended to apply to such a situation.

---

[25] No laches are or could be urged here. The Soviet Government before diplomatic recognition was barred from suit in our courts, and upon recognition on November 16, 1933, assigned this claim to the United States. Thereafter this suit was commenced on September 21, 1934.

The respondent submits that the rule of international law, in force when the New York statute of limitations was enacted, that government claims in international tribunals are not subject to local limitations, supports the view that the New York legislature did not intend by the general terms of its statute of limitations to include this claim of a foreign sovereign.

4. The rule that sovereigns are immune from suit requires the interpretation that the New York statute of limitations does not intend to include foreign sovereigns

The respondent contends that New York, lacking the status of a sovereign with respect to foreign sovereigns, has no power to subject a foreign sovereign to its statute of limitations (pp. 78–82, *infra*). The respondent also contends that because of this lack of power the state statute should not be presumed or construed to have attempted to bar foreign sovereigns (p. 78, *infra*). But even if New York were a complete sovereign, with the same power to subject a foreign sovereign within its territory to the jurisdiction of its courts that is possessed by the United States, the New York statute should not be so construed because it is not to be thought that the Legislature intended in this manner to modify the rule of the law of nations that sovereigns and their property are immune from suit.

It is a cardinal rule of international law that the person and property of a foreign sovereign are immune from suit, without its consent, in the courts of all nations. *Berrizzi Bros.* v. *S. S. Pesaro.*

271 U. S. 562; *The Exchange,* 7 Cranch 116; *The Parlement Belge,* L. R. 5 P. D. 197 (C. A. 1878).

The states of the Union, including New York, have never questioned this rule. *Briggs* v. *The Light-Ships,* 22 Allen (Mass.) 157; *People* v. *Dennison,* 84 N. Y. 272, 281; *Hassard* v. *United States of Mexico,* 29 Misc. (N. Y.) 511; *Manning* v. *Nicaragua,* 14 Howard's Practice 517. The respondent submits that an examination of the basis and development of this rule of sovereign immunity from suit, and the recognized related immunities from judgment or execution even when the sovereign sues makes it clear that an inseparable part of the immunity from suit is an immunity from statutes of limitations.

In the leading case *The Exchange,* 7 Cranch 116, Chief Justice Marshall explained the basis of the immunity of a foreign sovereign and its property from the jurisdiction of our courts. That case tested the rule under trying circumstances because the facts pleaded in the libel, to recover the vessel, were that the vessel of the libellants, American citizens, was unlawfully seized and converted into a public vessel of war of a friendly foreign sovereign, by Napoleon, Emperor of the French, without sentence or decree of condemnation by a court. Upon a suggestion filed by the United States Attorney, at the instance of the executive department of the United States Government, the District Court dismissed the libel on the ground that a public armed

vessel of a friendly foreign sovereign is not subject to the ordinary judicial tribunals of the country. The Circuit Court reversed, but the Supreme Court affirmed, the sentence of the District Court.

The unanimous opinion of this Court, delivered by Chief Justice Marshall, explained the immunity by the following reasoning: A sovereign's exclusive and absolute jurisdiction within its own territory, even with respect to suits against foreign sovereigns, is, of course, subject only to the limitations imposed by itself. All sovereigns, however, suable in their own courts only by their consent and possessing equal rights and equal independence, have consented for their mutual advantage to an exception to their absolute jurisdiction over each other in their respective territories. The exception, in which the whole world has concurred, is based on the fact that a foreign nation is not understood as intending to subject itself to another jurisdiction which would be incompatible with its dignity and its independence from any superior authority. There exists, therefore, a consent by every sovereign to this immunity of sister sovereigns, either expressed or implied, and the extent of this consent is to be tested by the common usage of nations. The Chief Justice remarked at p. 137:

> A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not con-

> summate to the usages and received obligations of the civilized world.

And at p. 146:

> Without doubt, the sovereign of the place is capable of destroying this implication [of consent to immunity]. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.

The leading English case, *The Parlement Belge*, L. R. 5 P. D. 197 (C. A. 1878), involved an admiralty proceeding *in rem* on behalf of owners of a vessel to recover redress for a collision with the Parlement Belge, an unarmed packet belonging to the King of Belgium and employed in carrying mail and also merchandise and passengers for hire between Dover and Ostend. The Court of Appeals reversed a judgment of the Admiralty Division which had overruled a protest by the Attorney General that the court had no jurisdiction and had ordered a warrant of arrest to issue.

Lord Justice Brett, delivering the opinion of the Court of Appeal, remarked that the first case to be considered on the question was, and always would be, *The Exchange, supra,* and he quoted from the opinion of this Court in that case at length and with

approval. He stated that the question whether the vessel was exempt from jurisdiction depended upon whether all nations have agreed it shall be, or in other words, whether it is so by the law of nations, which depends upon universal implied agreement. The opinion states, at p. 207:

> from all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority.

Rejecting an attempted distinction between jurisdiction over the person and jurisdiction over the property of the foreign sovereign, and speaking of the latter type of attempted jurisdiction the Court stated at p. 219:

> To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.

The respondent submits that to place the foreign sovereign in the position of being compelled to sue

in the New York courts or sacrificing his remedy there is, through the bar of limitations, a breach of the principle upon which its immunity rests.

As a consequence of this basic immunity from suit, foreign sovereigns, even when they voluntarily sue, have been held immune from interpleader or affirmative judgment on counterclaim without consent (*Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2nd) *Hassard* v. *United States of Mexico, supra,* and immunity from execution of judgment even in an action in which the sovereign has consented to be sued. *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen,* 43 F. (2d) 705 (C. C. A. 2nd).

The respondent submits that this Court already has stated that the immunity from suit and the immunity from statutes of limitations are attributes of sovereignty which rest on the same basis. *United States* v. *Thompson,* 98 U. S. 486. In that case, holding that the Minnesota six-year statutory period of limitations for contract actions, which expressly included the State but not the United States, did not and could not bind the United States, this Court stated, that it "is not to be presumed that such was the intention of the State legislature in passing the act * * *. If the States can pass statutes of limitations binding upon the Federal government, they can by like means make it suable within their respective jurisdictions." The respondent submits that it is not to be presumed that it was the intention of the New York

legislature to bind foreign sovereigns and to that extent violate the rule of the law of nations that sovereigns are immune from suit. Municipal laws will not be construed to violate international law. *The Charming Betsy,* 2 Cranch 64.

The instances relied upon by petitioner in which foreign sovereigns are subjected to processes of the courts in which they pursue their rights (Brief, pp. 40–44) are distinguishable upon the general ground that when a foreign sovereign comes into the courts of another State, there is no loss of dignity in its subjecting itself to the ordinary routine procedural rules designed to *facilitate* its enforcement of its rights. Essentially, the foreign sovereign agrees to abide by such rules because they are designed to secure an examination of its claims upon the merits. This cannot and does not mean, however, that in coming into the courts of another State, the sovereign waives its immunity from affirmative action designed to defeat its rights before they are examined upon the merits.

To show the applicability of the local rule of limitations to the foreign sovereigns, the petitioner discusses (Brief, pp. 23–27) four cases decided in American courts. The respondent submits that none of these cases touches the problem now before this Court. In *Western Lunatic Asylum* v. *Miller,* 29 W. Va. 326 (1887), the Court stated that the plaintiff, a public corporation of Virginia, was subject to the same limitations as a natural person,

and then stated that conceding the plaintiff and the Commonwealth of Virginia were one, the local limitation barred Virginia. It is to be noted that West Virginia had a statute of limitations binding the local sovereign. This case, we submit, does not apply to the wholly different question involved here of the application of a local statute of limitations which does not bind the United States to a claim obtained by the United States by assignment from a foreign sovereign. The petitioner, itself, admits (Brief p. 48) that the States of the Union are not nations either as among themselves or in respect of foreign nations, citing *New Hampshire* v. *Louisiana,* 108 U. S. 76, 90.

In *Commissioners of the Sinking Fund of Louisville* v. *Buckner,* 48 Fed. 533 (C. C. Ky. 1891), the Court had before it the question of limitations as applied in connection with a special tax statute. It held no more than that a two-year limitation on suits against collectors to recover Federal taxes applied to a municipality, because the remedy was indirectly against the United States and the statute providing the conditions on which the United States consented to suit must be complied with in every respect, by every one. The reference by the Court to the operation of the statute of limitations against a foreign State is bare dictum, utterly unsupported by authority.

In *United States* v. *Brown,* 247 N. Y., 211 (1928), the Court held that the United States was not bound

by the local statutes of limitations, and remarked "nor is it a case where another State or foreign government comes to us for relief." That language is a dictum and not a ruling in support of the petitioner and, in so far as it places another State and a foreign sovereign in the same category, it is not in accord with the principles stated by this Court in *United States* v. *Belmont*, 301 U. S. 324.

In *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468, the record reveals that the questions as to the operation of the statute of limitations against the foreign sovereign plaintiff was presented for the first time on a motion for re-argument in the Appellate Division of the Supreme Court of New York after its decision and was not before that Court when it made its judgment later affirmed by the Court of Appeals without opinion.

It is submitted, therefore, that none of the American cases on which the petitioner relies is in any way authority for its contention that a foreign sovereign is bound by a state statute of limitations.

The petitioner urges (Brief, pp. 45–51) that the statute of limitations has long been recognized as a meritorious defense. There is no dispute with this contention. However, in its application and enforcement, the statute of limitations must be confined, we submit, to those standard instances where the "reasons which induced the enactment of these statutes" are present. The statute of limitations is not such a meritorious defense that either the

law or the facts should be strained in its aid. *Bowman* v. *Colfax*, 17 Wash. 344, 347.[26]

The petitioner also strongly relies (Brief p. 27) in support of its statement that to hold the foreign sovereign bound by local limitations is "in accord with the universal practice abroad," upon *Gouvernement espagnol* v. *Veuve et Heritiers d'Aguado*, Paris Court of Appeal (1867) Dalloz, 1867, II, 49. In that case, the Spanish Government instituted an action for an accounting thirty-seven years after its cause of action accrued. The lower court (Civil Tribunal of the Seine) dismissed the action and on appeal to the intermediate court (Paris Court of Appeal) the judgment was affirmed. Both courts applied the French statute of limitations which, it is to be noted, was a *national* statute and not one of a local political subdivision. On appeal to the French Court of Cassation (not referred to in petitioner's brief) the plaintiff for the *first* time maintained the position that the French law governing limitations was not applicable against it. The Court of Cassation held (Journal du Palais, 1869, p. 118) that the plaintiff, the Spanish

[26] See also *Senninger* v. *Rowley*, 138 Iowa 617; *Wooster* v. *Scorse*, 16 Ariz. 11. In *Billings* v. *Hall*, 7 Calif. 1, the court states (p. 4):

"* * * It would be inconsistent with sound morality and wise legislation to suppose that it was ever intended, that when a party gave his obligation to pay a particular debt, he was presumed to have in his mind a particular period of time, beyond which, if he protracted his obligation, his liability would cease * * *."

Government, would not be heard to assert this contention for the first time before the highest Appellate Court.

The respondent submits that this ruling of the French Court of Cassation completely disposes any applicability the *Aguado* case may be claimed to have to the instant case.

The petitioner appends to its brief (pp. 96–116) a number of Code provisions and some decisions of various foreign courts. It is to be noted that practically all of the statutory provisions relate to the application of "prescription." It is impossible, without the presentation and examination of the interpretative law in each State to ascertain whether "prescription" includes both acquisitive and extinctive prescription, and whether there is any basis for drawing the conclusion which the petitioner attempts to draw that even if the local sovereign chooses to make a rule of limitation applicable to itself, it would hold a foreign sovereign coming into its court bound by that rule. Certainly it does not appear that a foreign sovereign would not be accorded the privileges and immunities of the local sovereign which is all respondent contends for here. For that reason, the respondent submits that these statutory provisions are wholly irrelevant to the precise question presented to this Court in this case.

Particularly, the petitioner is not justified in stating, as it does (Brief, pp. 18, 112–114) that the statute of limitations of the Soviet Government

binds the local sovereign and would bind a foreign sovereign suing in its courts. An analysis of the Soviet law (Appendix, pp. 108–118) shows definitely that in a suit by the State to recover State property or to protect and enforce public rights, the statute of limitations does not bar the State.

The petitioner states (Brief, p. 4) that the deposit was an ordinary commercial transaction. In fact, the deposit was part of the proceeds of a public loan and constituted public property of a foreign sovereign in the United States. *Berrizzi Bros.* v. *S. S. Pesaro,* 271 U. S. 562; *Kingdom of Roumania* v. *Guaranty Trust Co.,* 250 Fed. 341 (C. C. A. 2d).

The law is well settled that such public property enjoys full immunity. *Stockwell* v. *Bates,* 10 Abb. Pr. (N. S.) (N. Y.) 331; *Leavitt* v. *Dabney,* 37 How. Pr. (N. Y.) 264; *v. Hellfeld* g. *den Fiskus des russischen Reiches* (Germany, 1910), 5 A. J. I. L. 490.

5. Lack of power of New York to bind foreign sovereigns by its statute of limitations requires construction that such a result was not intended

New York lacks power to bind foreign sovereigns by its statutes of limitations (*infra,* pp. 78–82). Even a serious doubt concerning that power requires a construction that the statute, which does not include foreign sovereigns expressly, does not intend to include foreign sovereigns. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375.

B. The State lacks power to bind a foreign sovereign by a statute of limitations

Even apart from the international compact here involved (Part Four, *infra*, pp. 90–97) if the New York statute of limitations is construed to include foreign sovereigns it is invalid, because to that extent it invades the exclusive federal field of the foreign relations of the United States. This conclusion follows, it is submitted, from the fact that the United States is our sole international sovereign charged with international rights and obligations. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *United States* v. *Rauscher*, 119 U. S. 407, 412, 414; *Holmes* v. *Jennison*, 14 Pet. 540, 573; *People* v. *Curtiss*, 50 N. Y. 32.

The Constitution in several express provisions discloses the plan that international relations shall be exclusively a federal matter (Article I, Section 10; Article II, Sections 2–3; Article III, Section 2). Congress has provided for removal from state to federal courts causes involving foreign sovereigns. *Oliver Co.* v. *Mexico*, 264 U. S. 440, case transferred to Circuit Court of Appeals for the Second Circuit, 5 F. (2d) 659; certiorari denied, 267 U. S. 596.

Questions of public international law have always been considered as questions not of local but of national law and concern. *The Lottawanna*, 21 Wall. 558.

The exclusive power of the United States to regulate foreign relations is a necessary concomitant of nationality not dependent upon the affirmative

grants of the Constitution. As an equal member of the family of nations the United States had this power before adoption of the Constitution and the States never possessed this power. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318. It follows from this broad power that even where the Federal Government has not acted affirmatively the states are powerless to act in the field of foreign relations. *United States* v. *Rauscher*, 119 U. S. 407, 412–414; *Henderson et al.* v. *Mayor of New York, et al.*, 92 U. S. 259, 271–272; *Holmes* v. *Jennison*, 14 Pet. 540, 573.

In the *Henderson* case, *supra*, holding unconstitutional a statute of New York requiring shipowners to pay a small fee or tax in lieu of giving a bond for each passenger landed at the port, this Court stated (p. 273):

> A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. It is in fact, in an eminent degree, a

> subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation.

In the *Rauscher* case, *supra,* this Court, holding that one extradited from England to be tried for murder here could not be tried for a minor offense not included in the treaty of extradition with Great Britain, stated (p. 414):

> At this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government.

Subjection of foreign sovereigns to state statutes of limitation to which the United States cannot be subjected violates the fundamental rule of the law of nations that all international sovereigns are equal. Neither the United States nor any foreign sovereign can be subjected to suit in any federal or state court. *The Exchange,* 7 Cranch. 116. The immunity of the United States from suit rests upon the same foundation as the immunity from state statutes of limitations. *United States* v. *Thompson,* 98 U. S. 486, 490. The equality which must be extended to a foreign sovereign requires

immunity of foreign sovereigns from state statutes of limitations.

Moreover, subjection of either the United States or a foreign sovereign to the scores of different state statutes of limitations for actions based on simple contract, ranging from three to fifteen years[27] would subject the public rights and property of sovereigns to varying and changing limitations of the states. *United States* v. *Thompson, supra; U. S.* v. *Hoar,* 2 Mason 311. In fields of national activity uniformity is required. *Henderson et al.* v. *Mayor of N. Y. et al., supra.*

Part Three

The Plaintiff in This Action, the Paramount Domestic Sovereign, the United States, Is Not Barred by the State Statute of Limitations

It has been assumed in Part Two, *supra,* solely for purposes of logical organization of this argument, that the United States is in no better position than the Soviet Government in bringing this action. The respondent contends, however, that even if the facts were sufficient for the statute of limitations to run against a private person, which the respondent denies (Part One, *supra,* pp. 11–49), and even if such a state statute could be invoked against a foreign sovereign suing in a federal court, which respondent denies (Part Two, *supra,* pp.

[27] Mix, Statutes of Limitations, 3 Rocky Mountain L. R. 106, 118–129; Appendix, pp. 117–118.

49–82), nevertheless, the statute does not apply in this action because (I) a state statute of limitations is not applicable, under the Federal Rules of Decision Act, in a law action in the federal courts by the United States; and (II) even if the statute bars the Soviet Government's remedy, it does not bar the remedy of the United States.

I

Under the Federal Rules of Decision Act, a State statute of limitations cannot apply to a law action by the United States in the Federal courts

The respondent contends in Part Two, I, *supra*, pp. 50–53, that a state statute of limitations, within the meaning of the Rules of Decision Act (R. S. Sec. 721), does not apply to this law action in a federal court even if the foreign sovereign was the plaintiff. Even assuming that the state statute might apply to a foreign sovereign, still it cannot apply to this action in which the United States is the plaintiff. *United States* v. *Thompson*, 98 U. S. 483; *United States* v. *Hoar*, 2 Mason 311, 26 Fed. Cas. p. 329, No. 15,373, discussed *supra* pp. 50–53, on the related question of application of a state statute of limitations in a law action by a foreign sovereign in a federal court.

In *United States* v. *Thompson*, *supra*, this Court stated at page 490 "it certainly was not [the intention] of Congress in enacting the law of 1789" (the Rules of Decision Act), that a state statute of

limitations, construed to apply to the United States, could be applied in an action at law in the federal courts.

II

Even if the Soviet Government's remedy to recover this claim would be barred by the New York statute of limitations, the remedy of the United States is not barred

The respondent contends that even if the remedy of the Soviet Government in the Federal courts of New York to enforce its right to recover the claim be barred by the New York statute, the remedy of its assignee, the United States, is not barred because generally and as a matter of New York law the statute of limitations affects the remedy and does not extinguish the right.

The New York statute of limitations operates to bar the remedy but does not extinguish the right. *Lightfoot* v. *Davis,* 198 N. Y. 261, 264. This is expressly admitted by the petitioner (Brief pp. 45, 53, 54).

An acknowledgment of the existence of the debt tolls the operation of the statute or, in the event that the statute had run, revives or continues the remedy without a new promise. *Waltemire* v. *Westover,* 14 N. Y. 16, 20–21; *Dean* v. *Hewit,* 5 Wend. (N. Y.) 257, 262; *Lightfoot* v. *Davis, supra.* Even after a defense under the statute has accrued, the legislature may extend the period of limitations or abolish the defense entirely. *Hul-*

bert v. *Clark*, 128 N. Y. 295, 297; *Campbell* v. *Holt*, 115 U. S. 620; *Orman* v. *Van Arsdell*, 12 N. Mex. 344; *McEldowney* v. *Wyatt*, 44 W. Va. 711.[28]

Since the debt owed by the petitioner to the Soviet Government is, therefore, a subsisting debt, the right which the Soviet Government assigned to the United States was and is a valid, subsisting right. The defense of limitations may not be interposed in a suit by the United States. *Phillips* v. *Commissioner*, 283 U. S. 589, 602; *Davis* v. *Corona Coal Co.*, 265 U. S. 219, 222; *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 125.

Where the statute of limitations operates only upon the remedy and not upon the right, a transfer of a claim to another forum, or of the parties to another domicile, makes possible a successful action upon the debt in the new forum, even though the cause of action had been barred by the law of the state where the claim arose. *Putnam* v. *Dike*, 79 Mass. 535; *Carver* v. *Adams*, 38 Vt. 500.[29] Even the fact that an action was commenced in one forum and there held barred by the statute of limitations of the forum does not preclude the suc-

[28] It is significant to note that the State of New York has itself expressly restored the remedy with respect to claims by or against former Russian corporations "whether or not said action has heretofore been barred by any statute of limitations of this State or any other state or country." New York Civil Practice Act, Sec. 977b, Subsection 18.

[29] See *Tarbell v. Grand Trunk Ry.*, 94 U. S. 449; cf. *Gans* v. *Frank*, 36 Barb (N. Y.) 320, 322–323; Mix, State Statutes of Limitations, 3 Rocky Mountain L. R. 106, 113.

cessful prosecution of the action in another forum in which it was not barred. *Warner* v. *Buffalo Dry Dock Co.*, 67 F. (2d) 540 (C. C. A. 2d), certiorari denied, 291 U. S. 678.[30]

That unenforceable debts may become enforceable by assignment is shown by *South Dakota* v. *North Carolina*, 192 U. S. 286. There a citizen of New York owned certain bonds, assured by the State of North Carolina which, after it had defaulted on its obligation on the bonds, refused to permit suit to be brought against it or to provide a forum. The claimant was barred by the Eleventh Amendment to the Constitution from resorting to Federal courts. More than thirty years after North Carolina's default (p. 323) the holder assigned his claim to the State of South Dakota

---

[30] In that case the court allowed recovery on a cause of action not barred under New York law, although a suit thereon had theretofore been brought in Ohio and there held barred by the statute of limitations of that state. The court said (p. 542):

"The law in New York as to the effect of a foreign statute of limitations which does not operate to transfer title to property is likewise that it affects the remedy and not the right. * * * The Ohio decree * * * did not decide that the plaintiff's claim was extinguished, but only that they could not sue in Ohio."

This entire doctrine is, of course, consonant with the theory underlying those cases which hold that where one of several available remedies is barred by limitations, the vindication of the right by an action of a character not barred is not precluded. *United States* v. *Whited & Wheeless*, 246 U. S. 552, 564; *Ganley* v. *Troy City National Bank*, 98 U. S. 487; *Matter of Rodgers*, 153 N. Y. 316.

which instituted an action under the original jurisdiction of this Court, and recovered a judgment against North Carolina. The rule of that case, that where an unenforceable claim has been assigned to a person who has a remedy not available to the assignor, the assignee may assert the claim successfully, is fully applicable to the instant case. Assuming that no remedy was available to the assignor, what the United States received remained at all times an existing, living obligation which may be successfully asserted by the United States, against which the statute of limitations may not be pleaded to defeat the enforcement of its rights.[31]

United States v. *Buford,* 3 Pet. 12, is relied upon by the petitioner as sustaining an opposite doctrine. But that case is to be distinguished from the instant case because there the *obligation* assigned was extinguished by the Kentucky statute of limitations, while here the statute did not extinguish the obligation, but merely barred the *remedy.*

Because of the Kentucky rule that its statute extinguishes the obligation a new promise, creating a new right, is required to create a cause of action.[32]

---

[31] See *Administrator of Hungarian Property* v. *Finegold* (K. B. Div.), 144 L. T. Reports 670; *Phelps* v. *McDonald,* 99 U. S. 298, 301–304; *Conegys* v. *Vasse,* 1 Pet. 193, 216.

[32] *Head's Executor* v. *Manners, Admr.,* 5 J. J. March (Ky.) 255, 260, 261; *Harrison* v. *Handley,* 1 Bibb (Ky.) 443, 445; *Bell* v. *Rowland's Admrs.,* 1 Hardin (Ky.) 301, 303.

In *Bell* v. *Morrison,* 1 Pet. 351, this Court, basing its decision on that rule of Kentucky law and affirming a judgment for the defendants, after a jury verdict, based on the Kentucky statute of limitations, stated, in an opinion of Mr. Justice Story, at p. 373:

> * * * The acknowledgment, if it is to operate at all, is to create a new cause of action; to revive a debt which is extinct; and thus to give an action, which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, *the creation of a new right,* and not the enforcement of an old one.[33]

It follows, therefore, that since in the *Buford* case the right itself was extinguished nothing was assigned to the United States, a situation not presented in the instant case. The courts of the State of New York have rejected the rule of the *Bell* case clearly upon the ground that the New York statute applied only to the remedy.[34]

---

[33] In the *Buford* case, counsel for successful party urged upon the Court (p. 25) that:

"The principles recognized in this court in *Bell* v. *Morrison*, 1 Pet. 351, in reference to the statute of limitations, establish the rule to be, that an acknowledgment of the debt will not take the case out of the statute. There must be a promise to pay the debt. The courts of Kentucky have held these principles to be correct, and they support the decision of the circuit court upon the agreement between the defendant and Morrison."

[34] In *Henry* v. *Root*, 33 N. Y. 536, 532–533, 535, the New York Court of Appeals, discussing Mr. Justice Story's opin-

The *Buford* case (as well as *King* v. *Morrall*, 6 Price 24) was urged by counsel for the defendant and in the dissenting opinion (pp. 344–346) in *South Dakota* v. *North Carolina, supra,* as controlling authority, but was rejected by the majority of the Court apparently, we submit, upon the same grounds of distinction urged in the instant case, namely, that in the *South Dakota* case, as here, there was a subsisting right temporarily unenforceable for lack of a remedy. The respondent contends that unless this view of the treatment accorded to the *Buford* case in the *South Dakota* case be adopted, it must be concluded that *sub silentio* this Court there overruled the *Buford* case.

At best, the *Buford* case stands for the proposition that an assignee takes no better *title* than its assignor, but the United States, as assignee, can, and does, possess a *superior remedy* to its assignor.

---

ion in the *Bell* case, dealt with the effect of a discharge of a bankrupt by a certificate or under the insolvency law, and stated that in such a case the debt has ceased to exist; to revive the moral obligation a new promise, equivalent to a new contract, was necessary; but, "in the case of a debt barred by the statute of limitations, we have seen that the debt is not discharged, but the remedy by action is only taken away or suspended until the debt is revived."

In *Dean* v. *Hewit*, 5 Wend (N. Y.) 257, the court said (p. 262):

"A recognition of the existence of the debt, after the statute has attached, revives the remedy which was lost; but the course of action is the same as it was before the remedy was barred * * * It cannot be said, then, that the new promise either revives the course of action or the remedy; it only continues the latter * * *."

The right which was assigned to it was never destroyed. Here there was something to assign; in the *Buford* case there was nothing.

The respondent submits, therefore, that in such a situation the United States stands in a better position than a person not possessing the sovereign prerogatives which it enjoys. The debt, lawfully assigned to the United States, may be enforced by it.

Part Four

The New York Statute of Limitations Cannot Impede Consummation of the Litvinov Assignment

Finally, even if a state statute of limitations could apply to the United States, as assignee of a claim, in some circumstances, it cannot apply to defeat or impede enforcement of the claim asserted here under the international compact, known as the Litvinov Assignment, between the United States and the Soviet Government. *United States* v. *Belmont,* 301 U. S. 324. For this reason alone the decision of the court below is correct.

It is apparent that if the New York statute of limitations is applicable to suits by the United States based upon the Litvinov Assignment, the Assignment will be defeated and impeded *pro tanto.*[35]

In *United States* v. *Belmont, supra,* this Court held that an alleged New York State public policy

[35] At the time of the negotiation of this compact, the United States Government had claims against the Russian Government of approximately $300,000,000, and citizens of

against confiscation could not be invoked to defeat a claim to a bank deposit originally owned by a former Russian corporation and obtained by the United States under the Litvinov Assignment. Equally, in the present case, the respondent submits, the alleged bar of the New York statute of limitations, cannot be invoked to defeat a claim to a bank deposit originally owned by the Imperial Russian Government and obtained by the United States under the Litvinov Assignment.

In the *Belmont* case this Court stated at pages 331–332:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. * * * In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them

---

the United States had filed claims against the Russian Government with the Department of State to the extent of approximately $500,000,000. See Annual Report of the Secretary of the Treasury for fiscal year ended June 30, 1936 (75th Cong., 1st Sess., House Document No. 5), p. 470.

can be interposed as an obstacle to the effective operation of a federal constitutional power. Cf. *Missouri* v. *Holland,* 252 U. S. 416: *Asakura* v. *Seattle,* 265 U. S. 332, 341.

The conduct of our foreign relations is an exclusive national function. Negotiation is entrusted to the President alone. *U. S.* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 319; *MacKenzie* v. *Hare,* 239 U. S. 299, 311. The international compact pursuant to which the United States is seeking to recover the deposit in question, while not a formal treaty requiring the advice and consent of the Senate, is nevertheless one into which the President has authority to enter. *Altman & Co.* v. *United States,* 224 U. S. 583, 601; *United States* v. *Belmont,* 301 U. S., 324; *Monaco* v. *Mississippi,* 292 U. S. 292, 313, 331. The exercise of a federal power may not be trammelled by State legislation. *First National Bank* v. *California,* 262 U. S. 366, 370. See also *Tarble's Case,* 13 Wall. 397, 406; cf. *State* v. *County of Kings,* 125 N. Y. 312, 321.

The disposition of claims asserted by the United States and its nationals against the Soviet Government was a serious problem in the recognition of that Government by the United States. Preparatory to a final settlement, the Soviet Government assigned to the United States all claims which it had, as successor of prior Russian governments, or otherwise, against American nationals. By the acceptance of the Litvinov assignment, the United States impliedly undertook that it was in a position to and would collect the claims. Such an undertaking may not be avoided under interna-

tional law by a claim that the United States lacked full sovereignty and was impeded in the performance of its obligations by state legislation. *Chy Lung* v. *Freeman,* 92 U. S. 275, 280; *Buckner* v. *Finley,* 2 Pet. 586, 590. As this Court stated in the *Belmont* case (p. 327), there is involved a question of public concern, "the determination of which well might involve the good faith of the United States in the eyes of a foreign government."

The petitioner suggests (Brief, pp. 84–87) that the application of the explicit language of this Court in the *Belmont* case, quoted above, to the effect that the Litvinov assignment cannot be impeded by the state laws or policies is to be so narrowly construed as not to apply here. This suggestion cannot prevail. The deliberate character of the broad language used in the opinion of this Court is apparent. The fact that the Court's intimation that American nationals might possibly be able to raise a question under the Fifth Amendment appears only in the separate second part of the opinion and does not modify the first part of the opinion discussing state public policy, carries the strong implication that the question of the application of state laws and policies has been conclusively eliminated from cases involving the Litvinov assignment. The fact that the reference to adverse claims in the opinion had no relation to the first part of this Court's opinion is disclosed by the statement in the opinion at page 327:

> We do not pause to inquire whether in fact there was any policy of the State of

> New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved.

The petitioner's alleged defense of the statute of limitations, which may be withdrawn by the legislature, is not an adverse claim protected by the fifth amendment.

Former exercises of the power over foreign relations, in treaties, have been held to override state statutes of limitations. *Ware* v. *Hylton*, 3 Dall. 199; *Hopkirk* v. *Bell*, 3 Cranch 454.

The petitioner's last contention (Brief, pp. 87–91) that the international agreement did not intend to override state and federal [36] statutes cannot prevail in view of this Court's decision in the *Belmont* case that it is inconceivable that any state constitution, law, or policy can be an obstacle to the effective operation of a federal constitutional power. This Court's construction of the international compact was not made solely with relation to the particular facts involved in the *Belmont* case and is applicable to all actions arising under the compact.

The language of the Executive agreement does not support the petitioner's construction, purportedly based on the concurring opinion, that it did not intend to override state laws and policies. Cer-

---

[36] The petitioner's reference to a federal statute apparently is solely to the Federal Rules of Decision Act. It is apparent that no conflict between the international compact and that Act is in any way involved.

tainly the language does not suggest that various different state statutes and policies were to control the consummation of this agreement formed in the exercise of the broad external federal power over foreign relations, which is not and cannot be subject to any curtailment or interference on the part of the several states. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 316.

The national power over foreign relations was exercised in this agreement without regard to the various state statutes of limitations. When this compact was made, it was not intended by the sovereign parties that its consummation should be impeded by such local laws. This is indicated by the considerations (a) that the parties dealt as sovereign equals, (b) that under international law agreements between states are not construed to be affected by municipal statutes of limitations, and (c) that for purposes of our international relations the states of the Union do not exist.

(a) This agreement was made coincidently with the establishment of diplomatic relations between the two governments as equal sovereign powers. States statutes of limitations cannot bind the United States, and it was not intended that they should apply to claims of the Soviet Government to be asserted by the United States.

(b) Scrupulous good faith required in the discharge of the obligations of a compact between the two sovereigns forbids the assertion by one of the

sovereign parties that its municipal law prevents performance. *United States* v. *Belmont, supra;* Willoughby, *Constitutional Law;* Vol. I, Sec. 320 (2d ed.); Advisory Opinion, Permanent Court of International Justice, Series A/B No. 44, February 4, 1932; Oppenheim, *International Law,* Vol. I, Sec. 23 (5th ed.); Fenwick, *International Law,* pp. 75 *et seq.* (2d. ed.).

(c) For purposes of our international relations, the states do not exist. *United States* v. *Belmont, supra.* It follows, therefore, that it cannot be said that in making this international compact the sovereign parties intended that its consummation might be impeded by state statutes of limitations.

The petitioner relies on the absence of express language in the international compact stating that state law shall not affect its consummation. The respondent submits that the fact that the compact was made as an exercise of the power over foreign relations, a field from which the states are completely excluded, and with respect to which they do not exist, strongly implies that state laws shall not impede the compact.

Even in the absence of an express federal intent in fields of exclusively national concern, state action is not permitted. *United States* v. *Rauscher,* 119 U. S. 407, 412–414; *Henderson, et al.* v. *Mayor of New York, et al.,* 92 U. S. 259; *Holmes* v. *Jennison,* 14 Pet. 540, 573; *People* v. *Curtis,* 50 N. Y. 32. Even in fields of concurrent internal powers, silence

of Congress has been interpreted as prohibiting action by the states. *Cooley* v. *Board of Wardens*, 53 U. S. 299; cf. *Kelley, et al.* v. *State of Washington ex rel. Foss Co., Inc.*, 302 U. S. 1. Even in the absence of an exercise of the foreign relations power, and certainly in this case of an exercise of that power, state action cannot be permitted.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
SAM E. WHITAKER,
Assistant Attorney General.
DAVID E. HUDSON,
PAUL A. SWEENEY,
Special Assistant to the Attorney General.
EDWARD J. ENNIS,
Attorney.
AARON B. HOLMAN,
Special Attorney.
LEON E. SPENCER,
Assistant United States Attorney.
CYRIL Q. MARRON.

ERNST-THEODOR ARNDT,
LEAVENWORTH COLBY,
JOHN W. CONNOLLY, JR.,
WILLARD B. COWLES,
Of Counsel.

APPENDIX

STATUTES AND EXECUTIVE AGREEMENT INVOLVED

The Rules of Decision Act, Rev. Stat., Sec. 721 (U. S. C. Title 28, Sec. 725), provides:

> The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

The Civil Practice Act of the State of New York provides, so far as material:

> SEC. 15. Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete except in one of the following cases:
>
> * * * * *
>
> 2. Where there was a deposit of money not to be repaid at a fixed time but only upon a special demand, or a delivery of personal property not to be returned specifically or in kind at a fixed time or upon a fixed contingency, the time must be computed from the demand.
>
> * * * * *
>
> SEC. 48. The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument.

* * * * *

SEC. 54. The limitations prescribed in this article for actions other than for the recovery of real property apply alike to actions brought in the name of the people of the State, or for their benefit, and to actions by private persons.

* * * * *

SEC. 977-b—SUBSECTION 18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation, or annulment of its charter or organic law and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action by or on behalf of or against said corporation or by or against said receiver, whether or not said action has heretofore been barred by any statute of limitations of this state or of any other state or country.

The Rules of Civil Practice of the State of New York provide, so far as material:

RULE 107. Within twenty days after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint and affidavit stating facts tending to show:

* * * * *

6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon.

RULE 108. If the plaintiff on the hearing of a motion specified in the last rule shall present affidavits denying the facts alleged by the defendant or shall state facts tending to obviate the objection, the court may hear and determine the same and grant the motion, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just; or it may direct that the questions of fact, which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of which shall be reported to the court for its action; or it may overrule the objections, and in its discretion may allow the same facts to be alleged in the answer as a defense. If the objections be made to some of the causes of action, and not to all, judgment may be entered as provided in section ninety-six of the civil practice act or rule one hundred and ninety-five of the rules of civil practice.

INTERNATIONAL COMPACT

The executive agreement concluded November 16, 1933, between the President of the United States and the People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, consisted in an exchange of letters as follows:

WASHINGTON, *November 16, 1933.*

MY DEAR MR. PRESIDENT: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new

litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claim with respect to:

(a) Judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) Acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM LITVINOFF,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

MR. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

THE WHITE HOUSE,
WASHINGTON, *November 16, 1933.*

MY DEAR MR. LITVINOV: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) Judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) Acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,
Very sincerely yours,

FRANKLIN D. ROOSEVELT.

MR. MAXIM LITVINOV
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

RETIREMENT OF BAKHMETEFF

Exchange of Correspondence between Secretary Hughes and Mr. Bakhmeteff, April 28 and 29, 1922 [1]

RUSSIAN EMBASSY,
Washington, April 28, 1922.

MY DEAR MR. SECRETARY: In view of recent events I think it advisable to bring forward once more the subject of my position as the representative of Russia in the United States.

Received at Washington in July 1917, as Ambassador of the first democratic govern-

[1] Issued by the Department of State as a mimeographed press release, June 4, 1922.

ment of Russia, I have remained at my post up to the present time in order to serve and protect Russian national interests and to facilitate, in cooperation with the Treasury and State Departments, the liquidation and final settlement of a large volume of commercial business for which the Government of Russia stood obligated, partly through my agency, to American business concerns. I am happy to believe that American as well as Russian interests have been served thereby.

The work of liquidation has now been brought to a practical close. At the same time my status as Ambassador has been made the subject of renewed discussion. I am led to question whether my continuance, as Ambassador of Russia, will longer serve the best interests of my country and the convenience of the United States Government. I am prepared if the United States Government so desires, to retire and terminate my official functions.

On account of personal matters I have planned to sail from this country within the near future. It would be necessary to wind up my affairs and to arrange for the custody of the Russian property for which I am responsible. This work could be completed about the 30th of June, which date could be regarded as the date on which my retirement from official duties would take effect.

In the event of my retirement I suggested that Mr. Serge Ughet, Financial Attaché of the Embassy, be recognized as custodian of the properties in question and as the agent through whom pending business can be transacted and terminated.

In assuring you of my deep appreciation of the personal consideration I have always enjoyed at the hands of the State Depart-

ment, and other Departments of the American Government, I desire to express also my gratitude for the good will and consideration with which the United States has treated my country. America was first to welcome the advent of democracy in Russia and to recognize the Provisional Government. Since then and throughout Russia's great trial the United States has evidenced deep and sympathetic understanding of Russia's process of transformation and has conserved unbroken faith in the regeneration and happy future of the Russian people. The United States has lent friendly effort in preserving for the Russian people the integrity of their national patrimony and in safeguarding their economic freedom. Finally America has generously come to the relief of suffering and saved millions of Russians from starvation. For this assistance and support in the hour of distress Russia will conserve enternal gratitude.

I avail myself of the opportunity to express to you, my dear Mr. Secretary, the renewed assurances of my high esteem.

B. BAKHMETEFF.

The Honorable
The SECRETARY OF STATE,
Department of State.

DEPARTMENT OF STATE,
Washington, April 29, 1922.

MY DEAR MR. AMBASSADOR: I have received your letter of April 28, 1922, in which you bring forward the question of your status as Ambassador in the United States and suggest that it may be appropriate to have this terminate in the near future, inas-

much as the liquidation and final settlement of the business of the Russian Government in the United States for which you were responsible is now practically completed, and as your continuance as Ambassador under the existing circumstances may give rise to misunderstanding.

I believe that a change in the present situation is desirable and I am glad to be able to concur in your suggestions as to how this may best be brought about.

You will continue to be recognized as Ambassador until June 30 next. After this date the custody of the property of the Russian Government in this country for which you have been responsible will be considered to vest in Mr. Serge Ughet, the Financial Attaché of the Embassy. Mr. Ughet's diplomatic status with this Government will not be altered by the termination of your duties and he will continue to enjoy the usual diplomatic privileges and immunities.

With assurance of my high esteem and appreciating the friendly spirit in which you have dealt with all matters of interest to this Government, I am, my dear Mr. Bakhmeteff,

Very sincerely yours,

CHARLES E. HUGHES.

His Excellency
Mr. BORIS BAKHMETEFF,
Ambassador of Russia.

DEPARTMENT OF STATE,

The Honorable THE ATTORNEY GENERAL.

SIR: In response to your inquiry regarding the intention of the Government of the United States and the Government of the Union of Soviet Socialist Republics as set

forth in the exchange of letters dated November 16, 1933, between the People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics and the President of the United States relating to the assignment to the United States of amounts due the Soviet Government, you are advised as follows:

The second paragraph of the letter signed by the People's Commissar for Foreign Affairs has at all times been interpreted by this Government as in no way restricting or narrowing the scope of the assignment as set forth in the first paragraph of the said letter.

By Subdivision (b) of the second paragraph of this letter the Government of the Union of Soviet Socialist Republics is understood to have agreed not to make any claim in connection with adjustments, compromises, or agreements entered into or approved by any official of the Government of the United States or any State or Subdivision thereof, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

Very truly yours,

R. WALTON MOORE, *Counselor.*

The Soviet Statute of Limitations is contained in Sections 44 to 51, inclusive, of the Civil Code of the R. S. F. S. R. In its original form, Section 44, which went into effect on January 1, 1923, read as follows:

> The right to sue is extinguished upon the expiration of a three year period (actionable period) if no other period of limitation is established by law.[1]

With the development of the economic policy of the Soviet Union, and the gradual assumption of the majority of economic functions by the State, legislation was enacted providing certain special, shortened periods of limitation for disputes among the various State agencies and enterprises. Thus, the present version of the statute, constituting a

[1] The other sections of the statute provided that it began to run when the right to bring suit arose except where a demand obligation was involved, in which case the statute began to run from the time when the obligation arose (§ 45); that the barring of the principal claim barred all collateral claims (e. g., interest) as well (§ 46); that the performance of an obligation by a debtor after the statute had run gives no rise to an action for repayment (§ 47). The running of the statute became suspended if the claimant, as the result of insuperable force, could not sue (§ 48). In any case in which the court should find that the period of limitations had lapsed for meritorious reasons, it had the power to restore the cause of action and to extend the period (§ 49). The running of the statute was terminated by the institution of an action, as well as by any acts on the part of the obligor evidencing acknowledgment of the debt (§ 50), and upon such termination the statute began to operate anew (§ 51).

consolidation of numerous laws passed since 1923, prescribes, among others, a six months period for claims arising from delivery of goods of improper quality, a one year period for claims arising from combined rail, water, and air transport, and the like. However, the original three year general period of limitation remains unimpaired.

The case cited by the petitioner (Br. p. 113), *Administration of Siberian Railroads* v. *Representative of the Superior Council of Peoples Economy,* falls precisely into the group of cases affected by a special statute of limitations. The plaintiff received certain promissory notes from the defendant in payment for freight. The notes were not paid, and a judgment was recovered in an action brought before the Arbitration Council. Thereafter, the plaintiff sued to recover the difference in currency value occasioned by the fall in the value of the ruble in the course of the litigation. The defendant pleaded the expiration of the statute of limitations prescribed by Sections 101 and 102 of the Railroad Code, which provided that actions by railroads for the recovery of freight charges must be brought within *one year* after the cause of action accrued. The lower court upheld the defense, but granted the plaintiff leave to apply for an extension of the period of limitation under Sec. 49 of the Civil Code. On appeal, the Civil Cassation Collegium of the Supreme Court held that the cause of action had been barred by the

statute which, being a *special, shortened statute,* was not subject to discretionary extension.

The general rule concerning the exemption of State property and rights from the operation of the Statute of Limitations, has been expressed by an Explanation of the Plenum of the Supreme Court of the R. S. F. S. R., issued on June 29, 1925:

> * * * Under the law of the R. S. F. S. R. there is created the general presumption that all disputed property in the territory of the R. S. F. S. R. is State property until the contrary should be established * * * otherwise, in the absence in our law of the doctrine of acquisition by prescription, a considerable amount of property would remain without an owner * * *
>
> * * * The general rules concerning extinctive prescription (§ 44 GK) may not be applied to the recovery of State property from the illegal possession of another, particularly as the result of invalidity (by illegality) of a contract, because the right of ownership of the State is either a continuous right, or it arises only at the moment when the private owner loses his right through the invalid contract, i. e., by the expiration of the period of limitation upon the claim of the private owner to recover property which he had lost under the invalid contract.

This ruling has been uniformly followed in Soviet law. It has appeared, without modification, in every edition of "Collected Interpretations of the Supreme Court." In its report for the year 1925, the Civil Cassation Collegium stated (E. S. J., 1927, No. 4) that in connection with the Explanation

supra it had occasion to rule that the statute did not apply to suits of State organs for the recovery of property which for one reason or another should pass into their possession, mainly by virtue of Sec. 59 of the Civil Code, which provides that an owner has the right to recover his property from the illegal possession of another. However, the Collegium did hold the statute applicable in certain actions in which private, proprietary claims were asserted, such as one in which a State agency tried to recover damages caused by an individual more than three years before the action was brought. To this latter category may be relegated the decision of the Civil Cassation Collegium of April 1, 1929 (*Moscow Council of National Economy* v. *Zaglodin*) cited by the petitioner (Br. pp. 113–114), in which a State agency sued to recover rent from a private person.

We do not contend that the Soviet statute would not run against a claim of the Soviet State when it acts in a private, proprietary capacity. But where the State acts in its public capacity, to recover State property or to enforce or protect a public right, the decisions of the Soviet courts are unanimous in upholding the exemption.

Thus, in *Riazan Gubkommunotdel* v. *Kuleshov*, decided by the Civil Cassation Collegium (E. S. J., 1926, No. 37, Case N. 3582), the statute was held not to extend to suits by the State to recover property, occupied by the defendant, to which it had

become entitled by escheat by virtue of lapse of succession. In *Talimov Provincial Procurator* v. *Riazanov and Kuznetzov,* Civil Cassation Collegium (S. P., 1927, No. 10, Case No. 3672) the plaintiff, State's Attorney, brought an action to recover from the defendants a mill nationalized in 1921, but occupied by the defendants until 1926. The lower court dismissed the action by reason of the statute of limitations. On appeal, the court held that since the Procurator denied the defendants' right of ownership the claim had to be examined on the merits; and that the appearance of the Procurature, in the presence of a public interest, may not be compared with a private civil suit.

The *distinction* pressed by the petitioner at page 114 of its brief upon *Narkomprod* v. *Mosselprom,* 2 Dec. V. A. K. (Supreme Arbitration Council) No. 98, in which the possession of a factory was involved, and *Saratov Gubkomotdel* v. *Riazan-Ural R. R.,* 3 Dec. V. A. K. No. 106, in which one State agency tried to recover rent for premises occupied by another, precisely defines the rule that when *public rights* are involved, the statute does not run.

Thus, in *Tashkent Railway* v. *Kirghiz Central Council of National Economy,* 4 Dec. V. A. K. No. 378, which involved the recovery of certain hospital equipment given by the plaintiff to the defendant, and in *Volga-Caspian Fishing Bureau* v. *Riazan-Ural Railway,* decided by the V. A. K. on March 6, 1924, the court held that disputes arising from

public-legal relations must be examined upon the merits, regardless of the time when the suit is brought, and in *Administration of Archangel Commercial Port* v. *Severo-Belomorskoe Regional Administration,* 6 Dec. V. A. K. No. 78, where plaintiff sought to recover possession of certain storage houses and was met with the defense of limitations, the court stated, after holding that for other reasons the statute had not run, that

> where, as here, the dispute between State institutions concerns a public right, such a dispute cannot be extinguished by the three year period of limitations established for civil claims.

To the same effect is *Archangel Sevgosrybtrest* v. *Petchor River Gosparokhodstvo,* 6 Dec. V. A. K. No. 98, in which the dispute involved a river steamship.

Just as it is important to note that budgetary and accounting consideration impelled the Soviet Union to prescribe a number of special, short periods of limitation, it is essential to give proper importance to the presumption of State ownership existing in Soviet law. The very absence of acquisitive prescription in Soviet law to which the Petitioner points, taken together with the rule, uniformly expressed,[2] that "for the State, in the recovery of its property, *there is no prescription,* since we do not recognize acquisition by prescription, and

[2] P. I. Stuchka, "Civil Law and the Practice of Its Application," 3 Revolution of Law No. 2, pp. 131, 141.

property in some one's possession without a legal basis would thus remain ownerless; and ownerless property passes to the State," shows that in no event could the statute be applied to claims of the State *qua* State. This doctrine has been carried to the extent that in one case, *Klykov and Filimonova* v. *Dovgulin,* Civil Cassation Collegium (S. P., 1929, No. 19, Case No. 31846), where in a partition action the plaintiffs were held to have been barred by the statute, the court awarded their shares to the State, upon the ground that the defendant did not acquire anything by the lapse of limitations, in the absence of acquisitive prescription.

In view of the above, the true conclusion to be drawn from the Soviet Law as interpreted by its Courts is that there is a general three-year statute of limitations, but the Soviet Government is exempted therefrom when it sues in its sovereign capacity, asserting public rights or to recover public property. Petitioner's brief (p. 114) apparently admits this exemption which is accorded to the Soviet Government. That exemption would, under the principle of comity, which is accepted in the U. S. S. R. as elsewhere, be extended to the foreign sovereign suing in the Soviet Courts and asserting its sovereign or public rights.[8]

---

[8] Statement of Petitioner (Br. p. 114) that "It is indisputable, however, that an action by a foreign sovereign, in the courts of Russia, if permitted, would be held not to involve public rights" is not justified by any authority.

The text writers on Soviet law state that this is the proper conclusion to be drawn, as indicated in the following (A. G. Goikhbarg, in "International Law" (Moscow, 1928), p. 77):

> Our laws are silent about the rights of foreign States and of other foreign public-legal juridical persons in the territory of the U. S. S. R. This question is partly resolved in several conventions (e. g., convention with Germany). Generally, however, it should be said that a foreign State, as such, enjoys the rights of a juridical person in so far as between the U. S. S. R. and that foreign State there have been established normal diplomatic relations.

It is submitted, therefore, if the converse of the case at bar arose in the Soviet courts, and the United States Government sought to enforce a public right or to recover public property in Soviet courts, they would hold the United States, a foreign sovereign, to be exempt from the local statute of limitations.

Limitation periods which prevail in States of the United States

State	Accounts	Contracts in writing			Contracts not in writing	Judgments		Not otherwise specified
		Sealed	Unsealed			Domestic	Foreign	
			Promissory notes	Contracts				
Alabama	3 years	10 years	6 years	6 years	6 years	20 years	20 years	6 years.
Alaska	6 years	10 years	6 years	6 years	6 years	10 years	10 years	10 years.
Arizona	4 years	4 years	6 years	6 years	3 years	5 years	4 years	No limit.
Arkansas	3 years	5 years	5 years	5 years	3 years	10 years	10 years	5 years.
California	4 years	4 years	4 years	4 years	2 years	5 years	5 years	4 years.
Colorado	6 years	6 years	6 years	6 years	6 years	20 years	20 years	3 years.
Connecticut	6 years	17 years	17 years	6 years	3 years	No limit	No limit	No limit.
Delaware	No limit	20 years	6 years	6 years	3 years	5 years	5 years	No limit.
District of Columbia	3 years	12 years	3 years	3 years	3 years	12 years	No limit	3 years.
Florida	3 years	20 years	5 years	5 years	3 years	20 years	7 years	4 years.
Georgia	4 years	20 years	6 years	6 years	4 years	7 years	5 years	4 years.
Hawaii	6 years	6 years	6 years	6 years	6 years	20 years	No limit	6 years.
Idaho	4 years	5 years	5 years	5 years	4 years	6 years	6 years	4 years.
Illinois	5 years	10 years	10 years	10 years	5 years	20 years	5 years	5 years.
Indiana	6 years	10 years	10 years	10 years	6 years	20 years	20 years	15 years.
Iowa	5 years	10 years	10 years	10 years	5 years	20 years	20 years	5 years.
Kansas	3 years	5 years	5 years	5 years	3 years	Execution every 5 years.	Execution every 5 years.	5 years.
Kentucky	2 years	15 years	5 years	15 years	5 years	15 years	15 years	10 years.
Louisiana	3 years	10 years	5 years	Probably 10 years.	No limit	10 years	10 years	10 years.
Maine	6 years	20 years	6 years if not signed by att. wit.	6 years	6 years	20 years	20 years	20 years.

Maryland	3 years	12 years	3 years	3 years	3 years	12 years	12 years	No limit.
Massachusetts	6 years	20 years	20 years	6 years	6 years	20 years	20 years	No limit.
Michigan	6 years	No limit	6 years	6 years	6 years	10 years	10 years	6 years.
Minnesota	6 years	6 years	6 years	6 years	6 years	10 years	10 years	6 years.
Mississippi	3 years	6 years	6 years	6 years	3 years	7 years	7 years	6 years.
Missouri	5 years	10 years	10 years	10 years	5 years	10 years	10 years	10 years.
Montana	5 years	8 years	8 years	8 years	5 years	10 years	10 years	5 years.
Nebraska	4 years	5 years	5 years	5 years	4 years	Kept alive by exec. every 5 years.	5 years	4 years.
Nevada	4 years	6 years	6 years	6 years	4 years	6 years	6 years	4 years.
New Hampshire	6 years	20 years	6 years	6 years	6 years	20 years	20 years	6 years.
New Jersey	6 years	16 years	6 years	6 years	6 years	20 years	No statutory limit	No limit.
New Mexico	4 years	6 years	6 years	6 years	4 years	7 years	7 years	4 years.
New York	6 years	20 years	6 years	6 years	6 years	20 years	20 years	10 years.
North Carolina	3 years	10 years	3 years	3 years	3 years	10 years	10 years	10 years.
North Dakota	6 years	6 years	6 years	6 years	6 years	10 years	10 years	6 years.
Ohio	6 years	15 years	15 years	15 years	6 years		No time limit	10 years.
Oklahoma	3 years	5 years	5 years	5 years	3 years	5 years	1 year	5 years.
Oregon	6 years	10 years	6 years	6 years	6 years	10 years	10 years	10 years.
Pennsylvania	6 years	20 years	6 years	6 years	6 years	20 years	No limit	6 years.
Rhode Island	6 years	20 years	6 years	6 years	6 years	20 years	20 years	20 years.
South Carolina	6 years	20 years	6 years	6 years	6 years	20 years	20 years	10 years.
South Dakota	6 years	20 years	6 years	6 years	6 years	20 years	10 years	10 years.
Tennessee	6 years	6 years	6 years	6 years	6 years	10 years	10 years	10 years.
Texas	2 years	4 years	4 years	4 years	2 years	10 years	10 years	4 years.
Utah	4 years	6 years	6 years	6 years	4 years	8 years	8 years	4 years.
Vermont	6 years	8 years	6 years	6 years	6 years	8 years	8 years	No limit.
Virginia	3 years	10 years	5 years	5 years	3 years	10 years	10 years	5 years.
Washington	3 years	6 years	6 years	6 years	1 years	6 years	6 years	2 years.
West Virginia	5 years	10 years	10 years	10 years	5 years	10 years	10 years	5 years.
Wisconsin	6 years	20 years	6 years	6 years	6 years	20 years	10 years	6 years.
Wyoming	8 years	10 years	10 years	10 years	8 years	5 years		10 years.

U. S. GOVERNMENT PRINTING OFFICE: 1930

p.p. 3,5,6,7,9,12,8,

SUPREME COURT OF THE UNITED STATES.

No. 566.—October Term, 1937.

Guaranty Trust Company of New York, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 25, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The principal questions for decision are whether, in a suit at law brought in a federal district court to recover the deposit of a foreign government with a New York bank, such government is subject to the local statute of limitations as are private litigants; and, if so, whether the assignment of November 16, 1933, by the Russian Soviet Government to the United States of the right of the former to the bank account restricts or overrides the operation of the statute of limitations. A subsidiary question is whether in the circumstances of the case the running of the statute of limitations, if otherwise applicable, was affected by our nonrecognition of the Soviet Government during the interval of approximately sixteen years between recognition of the Provisional Government of Russia and recognition of its successor.

On July 15, 1916, the Imperial Russian Government opened a bank account with petitioner, the Guaranty Trust Company, a New York banking corporation. On March 16, 1917, the Imperial Government was overthrown and was succeeded by the Provisional Government of Russia which was recognized by the United States on March 22, 1917. On July 5, 1917, Mr. Boris Bakhmeteff was officially recognized by the President as the Ambassador of Russia. On July 12, 1917, the account being overdrawn, $5,000,000 was deposited in the account by Mr. Serge Ughet, Financial Attache of the Russian Embassy in the United States. On November 7, 1917, the Provisional Government was overthrown and was succeeded by the government of the Union of Soviet Socialist Republics, which will be referred to as the Soviet Government. At that time there remained on deposit in the account the sum of

approximately $5,000,000. On November 28, 1917, the Soviet Government dismissed Bakhmeteff as Ambassador and Ughet as Financial Attache. But the United States continued to recognize Bakhmeteff as Ambassador until on June 30, 1922, he withdrew from his representation of the Russian Government. Thereafter, until November 16, 1933, it continued to recognize the Financial Attache, and after the retirement of Bakhmeteff as Ambassador it recognized the former as custodian of Russian property in the United States.

On November 16, 1933, the United States recognized the Soviet Government, and on that date took from it an assignment of all "amounts admitted to be due that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations . . ." After making demand upon the petitioner for payment of the balance of the account the United States, on September 21, 1934, brought the present suit in the district court for southern New York to recover the deposit. Petitioner then moved under the Conformity Act, 28 U. S. C. § 724; New York Civil Practice Act, § 307; and Rules 107 and 120 of the New York Rules of Civil Practice, to dismiss the complaint on the ground that the recovery was barred by the New York six year statute of limitations.

In support of the motion petitioner submitted numerous affidavits, two depositions, and other documentary proof tending to show that on February 25, 1918, it had applied the balance of the account as a credit against indebtedness alleged to be due to it by the Russian Government by reason of the latter's seizure of certain ruble deposit accounts of petitioner in Russian private banks; that on that date it had repudiated all liability on the deposit account; and that it had then given notice of such repudiation to the Financial Attache of the Russian Embassy and later both to the Financial Attache and to Bakhmeteff as Ambassador. The United States submitted affidavits and exhibits in opposition. The district court found that petitioner had repudiated liability on the account on February 25, 1918; that it had given due notice of repudiation prior to June 30, 1922 to both the Financial Attache and Ambassador Bakhmeteff; and that recovery was barred by the applicable six year statute of limitations of New York. New York Civil Practice Act, § 48. The Court of Appeals for the second circuit reversed the judgment for petitioner, holding that the New

York statute of limitations does not run against a foreign sovereign. 91 F. (2d) 898. Moved by the importance of the questions involved, we granted certiorari. — U. S. —.

Respondent argues that the Soviet Government, in a suit brought in the federal courts, is not subject to the local statute of limitations both because a foreign, like a domestic sovereign, is not subject to statutes of limitations, and its immunity as in the case of a domestic sovereign constitutes an implied exception to that statute and to the Conformity Act; and because in any case, since no suit to recover the deposit could have been maintained in New York by the Soviet Government prior to its recognition by the United States and, since according to New York law the statute does not run during the period when suit cannot be brought, the present suit is not barred. It is insisted further that even though the Soviet Government is bound by the local statute of limitations the United States is not so bound, both because the New York statute which bars the remedy but does not extinguish the right is not applicable to the United States, and because the statute is inoperative and ineffective since it conflicts with and impedes the execution of the Executive Agreement between the Soviet Government and the United States by which the assignment was effected. Finally, the Government assails the finding of fact of the district court that petitioner repudiated the liability upon the deposit account, and contends that notice of the repudiation given by petitioner to representatives of the Provisional Government was ineffective to set the statute running against the Soviet Government and in favor of petitioner.

First. The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. See *Magdalen College Case,* 11 Co. Rep. 66b, 74b; Hobart, L. C. J. in *Sir Edward Coke's Case,* Gobd. 289, 295; Bracton, De Legibus, Lib. ii, c. 5, § 7. But whether or not that alone accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. Compare Maine, Ancient Law (10th ed., 1930) 32 *et seq.* "The true reason . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss by

the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments." Story, J., in *United States* v. *Hoar*, Fed. Cas. No. 15,373, p. 330. Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *United States* v. *Knight*, 14 Pet. 301, 315; *United States* v. *Thompson*, 98 U. S. 486, 489; *Fink* v. *O'Neil*, 106 U. S. 272, 281; *United States* v. *Nashville, C. & St. L. R. Co.*, 118 U. S. 120, 125. So complete has been its acceptance that the implied immunity of the domestic "sovereign", state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included; and to the Conformity Act. See *United States* v. *Thompson, supra.*

Whether the benefit of the rule should be extended to a foreign sovereign suing in a state or federal court is a question to which no conclusive answer is to be found in the authorities. Diligent search of counsel has revealed no judicial decision supporting such an application of the rule in this or any other country. The alleged immunity was doubted in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437, and in *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 Fed. 533. It was rejected in *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 329, and was disregarded in *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468, where neither appellate court delivered an opinion.

The only support found by the court below for a different conclusion is a remark in the opinion of the Court in *United States* v. *Nashville, C. & St. L. R. Co., supra,* where its holding that the United States, suing in a federal court, is not subject to the local statute of limitations, was said to rest upon a great principle of public policy "applicable to all governments alike". The statement is but a paraphrase, which has frequently appeared in judicial

opinion,[1] of Mr. Justice Story's statement in *United States* v. *Hoar*, *supra*, already quoted. His reference to the public policy supporting the rule that limitation does not run against a domestic sovereign as "equally applicable to all governments" was obviously designed to point out that the policy is as applicable to our own as to a monarchical form of government, and is therefore not to be discarded because of its former identity with the royal prerogative. We can find in that pronouncement and in its later versions no intimation that the policy underlying exemption of the domestic sovereign supports its extension to a foreign sovereign suing in our courts.

It is true that upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent. See *The Exchange*, 7 Cranch 116; *Berizzi Bros.* v. *S. S. Pesaro*, 271 U. S. 562; *The Navemar*, No. 242 this term, decided January 31, 1938. But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. See *The Sapphire*, 11 Wall. 164, 167; *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255. By voluntarily appearing in the rôle of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States* v. *The Thekla*, 266 U. S. 328, 340, 341; *United States* v. *Stinson*, 197 U. S. 200, 205; *The Davis*, 10 Wall. 15; *The Siren*, 7 Wall. 152, 159.[2] As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to in-

[1] United States v. Knight, 14 Pet. 301, 315; Gibson v. Chouteau, 13 Wall. 92, 99; United States v. Thompson, 98 U. S. 486, 490; Fink v. O'Neil, 106 U. S. 272, 281.

[2] A foreign sovereign as suitor is subject to the local rules of the domestic forum as to costs, Republic of Honduras v. Soto, 112 N. Y. 310; Emperor of Brazil v. Robinson, 5 Dowl. 522; Otho, King of Greece v. Wright, 6 Dowl. 12; The Beatrice, 36 L. J. Adm. 10; Queen of Holland v. Drukker, (1928) Ch. 877, 884, although the local sovereign does not pay costs. United States v. Verdier, 164 U. S. 213, 219. The foreign sovereign suing as a plaintiff must give discovery. Rothschild v. Queen of Portugal, 3 Y. & C. Ex. 594, 596; United States v. Wagner, L. R. 2 Ch. App. 582, 592, 595; Prioleau v. United States, L. R. 2 Eq. 659. A foreign sovereign plaintiff "should so far as the thing can be done be put in the same position as a body corporate". Republic of Costa Rica v. Erlanger, L. R. 1 Ch. D. 171, 174; Republic of Peru v. Weguelin, L. R. 20 Eq. 140, 141; cf. King of Spain v. Hullett, 7 Bligh N. S. 359, 392.

dividuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts. That this is the guiding principle sufficiently appears in the many instances in which courts have narrowly restricted the application of the rule *nullum tempus* in the case of the domestic sovereign.[3] It likewise appears from those cases which justify the rule as applied to the United States suing in a state court, on the ground that it is sovereign within the state and that invocation of the rule *nullum tempus* protects the public interest there as well as in every other state. *United States* v. *Beebe*, 127 U. S. 338; *Swearingen* v. *United States*, 11 Gill. & J. 373; *McNamee* v. *United States*, 11 Ark. 148; cf. *United States* v. *California*, 297 U. S. 175, 186.

We are unable to discern in the case where a foreign sovereign, by suit, seeks justice according to the law of the forum, any of the considerations of public policy which support the application of the rule *nullum tempus* to a domestic sovereign. The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. *Bell* v. ~~Morris, 1 Pet. 161, 180;~~ *M'Cluny* v. *Silliman*, 3 Pet. 270, 278; *Campbell* v. *Haverhill*, 155 U. S. 610, 617; *United States* v. *Oregon Lumber Co.*, 260 U. S. 290; *Bank* v. *Barnaby*, 197 N. Y. 210, 227; *Schmidt* v. *Merchants Despatch Transportation Co.*, 270 N. Y. 287, 302. Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it repre-

[3] The presumption of a grant by lapse of time will be indulged against the domestic sovereign. United States *v.* Chaves, 159 U. S. 452, 464. The rule *nullum tempus* has never been extended to agencies or grantees of the local sovereign such as municipalities, county boards, school districts and the like. Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1; Boone County *v.* Burlington and M. R. R. Co., 139 U. S. 684, 693. It has been held not to relieve the sovereign from giving the notice required by local law to charge endorsers of negotiable paper, United States *v.* Barker, 12 Wheat. 559; cf. Cooke *v.* United States, 91 U. S. 389, 398; Wilber National Bank *v.* United States, 294 U. S. 120, 124, and in tax cases has been narrowly construed against the domestic sovereign. Bowers *v.* New York & Albany Lighterage Co. 273 U. S. 346, 350. Compare United States *v.* Knight, 14 Pet. 301; Fink *v.* O'Neil, 106 U. S. 272.

sents. We cannot say that the public interest of the forum goes so far.

We lay aside questions not presented here which might arise if the national government, in the conduct of its foreign affairs, by treaty or other appropriate action, should undertake to restrict the application of local statutes of limitations against foreign governments, or if the states in enacting them should discriminate against suits brought by a foreign government. We decide only that in the absence of such action the limitation statutes of the forum run against a foreign government seeking a remedy afforded by the forum, as they run against private litigants.

Second. Respondent, relying on the New York rules that the statute of limitations does not run against a suit to recover a bank account until liability upon it is repudiated, *Tillman* v. *Guaranty Trust Co.*, 253 N. Y. 295, and that the statute of limitations does not run against a plaintiff who has no forum in which to assert his rights, *Oswego & Syracuse R. R.* v. *State*, 226 N. Y. 351, 369, 362; *Cayuga County* v. *State*, 153 N. Y. 279, 291; *Parmenter* v. *State*, 135 N. Y. 154, 163, argues that until recognition of the Soviet Government there was no person to whom notice of petitioner's repudiation could be given and no court in which suit could be maintained to recover the deposit.

It is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government. For this reason access to the federal and state courts was denied to the Soviet Government before recognition. *The Penza*, 277 Fed. 91; *The Rogdai*, 278 Fed. 294; *R. S. F. S. R.* v. *Cibrario*, 235 N. Y. 255; *Preobazhenski* v. *Cibrario*, 192 N. Y. Supp. 275. But the argument ignores the principle controlling here and recognized by the courts of New York that the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it, *The Sapphire, supra*, 168, and that suit in its behalf may be maintained in our courts only by that government which has been recognized by the political department of our own government as the authorized government of the foreign state. *Jones* v. *United States*, 137 U. S. 202, 212; *Russian Government* v. *Lehigh Valley R. Co.*, 293 Fed. 133, 135, aff'd *sub nom.* *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d)

396, 409; *Matter of Lehigh Valley R. Co.*, 265 U. S. 573; *R. S. F. S. R.* v. *Cibrario, supra;* Moore, International Law Digest, §§ 75, 78.

What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as well as to the underlying policy are to be addressed to it and not to the courts. Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them. *Jones* v. *United States, supra,* 212; *Agency of Canadian Car & Foundry Co.* v. *American Can Co.*, 258 Fed. 363; *Lehigh Valley R. Co.* v. *State of Russia, supra.*

We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government through its duly recognized representatives from March 16, 1917 to November 16, 1933, when the Soviet Government was recognized.[4] There was at all times during that period a recognized diplomatic representative of the Russian State to whom notice concerning its interests within the United States

[4] The United States accorded recognition to the Provisional Government March 16, 1917 and continued to recognize it until November 16, 1933, when the Soviet Government was recognized. During that period the United States declined to recognize the Soviet Government or to receive its accredited representative, and so certified in litigations pending in the federal courts. The Penza, *supra;* The Rogdai, *supra.* It recognized Mr. Bakhmeteff as Russian Ambassador from July 5, 1917 until June 30, 1922, when he retired, having designated Mr. Ughet as custodian of Russian property in the United States. Mr. Ughet, after his appointment as Financial Attache April 7, 1917, continued to be recognized as such by the United States until November 16, 1933. He was recognized by the United States as Charge d'Affaires ad interim during the absence of the Ambassador from December 3, 1918 to July 31, 1919. Their diplomatic status as stated was certified in the present suit by the Secretary of State, who stated that he considered Mr. Ughet's status unaffected by the termination of the Ambassador's duties.

Their status was certified to by the Department on October 31, 1918 and July 8, 1919, respectively, in Lehigh Valley Railroad Co. v. State of Russia, 293 Fed. 133. Mr. Bakhmeteff's status as Ambassador was certified May 18, 1919 in Agency of Canadian Car & Foundry Co. v. American Can Co., 258 Fed. 363, 368; on April 6, 1920 in The Rogdai, 278 Fed. 294, 295; on June 24, 1919 in The Penza, 277 Fed. 91, 93. Certificate with respect to both Mr. Bakhmeteff and Mr. Ughet was given February 19, 1923 and with respect to Mr. Ughet December 22, 1927. On the faith of the two last mentioned certificates the Court, in the Lehigh Valley Railroad case, *supra,* as stated by the Government's brief in the present case, ordered to be paid to Mr. Ughet approximately $1,000,000, of which more than $700,000 was paid to the United States Treasurer "on account of interest due on obligations of the Provisional Government of Russia by the Treasurer."

Russian Government v. Lehigh Valley R. Co.,

could be communicated, and to whom our courts were open for the purpose of prosecuting suits in behalf of the Russian State. In fact, during that period suits were brought in its behalf in both the federal and state courts, which consistently ruled that the recognized Ambassador and Financial Attache were authorized to maintain them.[5]

We do not stop to inquire what the "actual" authority of those diplomatic representatives may have been. When the question is of the running of the statute of limitations, it is enough that our courts have been open to suit on behalf of the Russian State in whom the right to sue upon the petitioner's present claim was vested, and that the political department of the Government has accorded recognition to a government of that state, received its diplomatic representatives, and extended to them the privilege of maintaining suit in our courts in behalf of their state. The right and opportunity to sue upon the claim against petitioner was not suspended; and notice of repudiation of the liability given to the duly recognized diplomatic representatives must, so far as our own courts are concerned, be taken as notice to the state whom they represented.

The Government argues that recognition of the Soviet Government, an action which for many purposes validated here that government's previous acts within its own territory, see *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *United States* v. *Belmont*, 301 U. S. 324; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 84, 85; *Luther* v. *Sagor & Co.*, [1921] 3 K. B. 532, operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded. This is tantamount to saying that the judgments in suits maintained here by the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government. The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here

[5] Russian Government v. Lehigh Valley R. Co., 293 Fed. 183; 293 Fed. 135, aff'd 21 F. (2d) 396; State of Russia v. Bankers Trust Co., 4 F. Supp. 417, 419, aff'd 83 F. (2d) 236. See also Agency of Canadian Car & Foundry Co. v. American Can Company, 258 Fed. 363.

between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure*. But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own government. The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.

So far as we are advised no court has sanctioned such a doctrine. The notion that the judgment in suits maintained by the representative of the Provisional Government would not be conclusive upon all successor governments, was considered and rejected in *Russian Government* v. *Lehigh Valley R. Co., supra.* An application for writ of prohibition was denied by this Court. 265 U. S. 573. We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition.

Third. If the claim of the Russian Government was barred by limitation the United States as its assignee can be in no better position either because of the rule *nullum tempus* or by virtue of the terms of the assignment. We need waste no time on refinements upon the suggested distinction between rights and remedies, for we may assume for present purposes that the United States acquired by the assignment whatever rights then survived the running of the statute against the Russian Government, and that it may assert those rights subject to such plea of limitations as may be made by petitioner.

As has already been noted, the rule *nullum tempus* rests on the public policy of protecting the domestic sovereign from omissions of its own officers and agents whose neglect, through lapse of time, would otherwise deprive it of rights. But the circumstances of

the present case admit of no appeal to such a policy. There has been no neglect or delay by the United States or its agents, and it has lost no rights by any lapse of time after the assignment. The question is whether the exemption of the United States from the consequences of the neglect of its own agents is enough to relieve it from the consequences of the Russian Government's failure to prosecute the claim. Proof, under a plea of limitation, that the six-year statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a preexisting infirmity, the running of limitations against its assignor, which public policy does not forbid. *United States* v. *Buford,* 3 Pet. 12, 30; *King* v. *Morrall,* 6 Price 24, 28, 30.

Assuming that the respective rights of petitioner and the Soviet Government could have been altered and that petitioner's right to plead the statute of limitations curtailed by force of an executive agreement between the President and the Soviet Government, we can find nothing in the agreement and assignment of November 16, 1933, which purports to enlarge the assigned rights in the hands of the United States, or to free it from the consequences of the failure of the Russian Government to prosecute its claim within the statutory period.

The agreement and assignment are embodied in a letter of Mr. Litvinov, People's Commissar of Foreign Affairs of the Soviet Government, to the President and the President's letter of the same date in reply. So far as now relevant the document signed in behalf of the Soviet Government makes mention of "amounts admitted to be due or that may be found to be due it as the successor of prior governments or otherwise from American nationals, including corporations, companies, partnerships or associations." It purports to "release and assign all such amounts to the Government of the United States" and the Soviet Government agrees, preparatory to final settlement of claims between it and the United States and the claims of their nationals, "not to make any claims with respect to . . . (b) Acts done or settlements made by or with the Government of the United States, or public officials of the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof".

The relevant portion of the document signed by the President is expressed in the following paragraph:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due".

There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. *United States* v. *Arredondo*, 6 Pet. 691, 748; *Haver* v. *Yaker*, 9 Wall. 32, 44; *Dooley* v. *United States*, 182 U. S. 222, 230; *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Todok* v. *Union State Bank*, 281 U. S. 449, 454. The assignment left unaffected the right of petitioner to set up against the United States the previous running of the statute of limitations.

Fourth. Respondent assails the finding of the district court that there was an unqualified repudiation by petitioner of its liability on the account, and in support of its contention presents an elaborate review of the evidence. The evidence is said to establish that petitioner's alleged repudiation was tentative and conditional, to await negotiations with a stable Russian government upon its recognition by the United States. If this contention be rejected, respondent insists that at least there is a conflict in the evidence and in the inferences which may be drawn from it which, under the local practice, should have been resolved by a full trial rather than summarily on motion. As these questions were not passed on by the Court of Appeals, the case will be remanded to that court for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.